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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MEGAN SCHMITT, DEANA
REILLY, CAROL ORLOWSKY, and
STEPHANIE MILLER BRUN,
individually and on behalf of
themselves and all others similarly
situated,

Plaintiffs,

v.

YOUNIQUE, LLC,

Defendant.

Case No. 8:17-cv-01397-JVS-JDE

**[PROPOSED] [AGREED] JOINT
JURY INSTRUCTIONS**

Pretrial Conference: February 4, 2019
Trial Date: February 19, 2019

DRAFT JURY INSTRUCTIONS

The parties hereby provide the Court with a set of draft jury instructions. Consistent with Dkt. 57 (6:18-21) and the form pretrial conference

order appended to the Local Rules as Appendix A, Plaintiffs will file the final set of jury instructions at least 7 days prior to the start of trial.

<u>NO.</u>	<u>DESCRIPTION</u>	<u>SOURCE</u>	<u>PG.</u>
1.	Duty of Jury	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.2	7
2.	Duty of Jury (Court reads and provides written instructions at end of case)	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.4	8
3.a	Claims and Defenses	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.5	9
3.b	Claims and Defenses	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.5	10
4.	Burden of Proof – Preponderance of the Evidence	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.6	12
5.	Burden of Proof – Clear and Convincing Evidence	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.7	12
6.	Class Action Defined	Judicial Council of California Civil Jury Instructions No. 338	13
7.	Materiality Defined	<i>Mazza v. Am. Honda Motor Co. Inc.</i> , 666 F.3d 581, 596 (9th Cir. 2012)	15
8.	Class-Wide Materiality	<i>Massachusetts Mut. Life Ins. Co. v. Superior Court</i> , 97 Cal.App.4th 1282 (2002)	16
9.	Class-Wide Exposure	<i>Mazza v. Am. Honda Motor Co. Inc.</i> , 666 F.3d 581, 596 (9th Cir. 2012)	16
10.	What is Evidence	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.9	17
11.	What is Not Evidence	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.10	18
12.	Evidence for a Limited Purpose	Manual of Model Civil Jury Instructions for the District Courts	19

		of the Ninth Circuit No. 1.11	
13.	Direct and Circumstantial Evidence	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.12	20
14.	Ruling on Objections	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.13	21
15.	Credibility of Witnesses	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.14	22
16.	Conduct of the Jury	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.15	23
17.	Publicity During Trial	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.16	25
18.	Taking Notes	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.18	26
19.	Bench Conferences and Recesses	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.20	27
20.	Outline of Trial	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.21	28
21.	Stipulated Testimony	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.1	29
22.	Stipulations of Fact	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.2	30
23.	Judicial Notice	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.3	31
24.	Deposition in Lieu of Live Testimony	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.4	31
25.	Impeachment Evidence - Witness	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.9	33
26.	Use of Interrogatories of a Party	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.11	33

1	27.	Expert Opinion	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.13	34
2	28.	Charts and Summaries Not Received in Evidence	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.14	35
3	29.	Charts and Summaries in Evidence	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.15	36
4	30.	Evidence in Electronic Format	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.16	36
5	31.	Duty to Deliberate	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 3.1	38
6	32.	Communication with Court	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 3.3	39
7	33.	Return of Verdict Form	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 3.5	40
8	34.	Corporations – Fair Treatment	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.1	41
9	35.	Liability of Corporations – Scope of Authority Not In Issue	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.2	42
10	36.	Scope of Authority Defined	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.5, without change.	42
11	37.	Independent Contractor – Definition	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.14, without change.	43
12	38.	Agent and Principal -- Definition	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.4	44
13	39.	Principal Sued but not Agent—Agency or Authority Denied	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.12.	45
14	40.	Ratification	Manual of Model Civil Jury Instructions for the District Courts	46

		of the Ninth Circuit No. 4.7	
41.	Act of Agent is Act of Principal	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.8	47
42.a	Damages – Proof	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 5.1	48
42.b	Damages – Proof	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 5.1	49
43.a	Punitive Damages	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 5.5.	51
43.b	Punitive Damages	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 5.5; Cal. Civ. Code § 3294; and <i>Hardt v. Chrysler Group LLC</i> , 2015 U.S. Dist. LEXIS 187386, *28-29 (C.D. Cal. June 15, 2015).	52
XX	Plaintiffs’ Placement of Clear and Convincing Instruction		55
44.	Arguments of Counsel not Evidence of Damages	Judicial Council of California Civil Jury Instructions No. 3925, without change.	56
45.	Experts – Questions Containing Assumed Facts	Judicial Council of California Civil Jury Instructions No. 220	56
46.a	Consumers Legal Remedies Act-Essential Factual Elements	Judicial Council of California Civil Jury Instructions No. 4700	57
46.b	Consumers Legal Remedies Act-Essential Factual Elements	Judicial Council of California Civil Jury Instructions No. 4700	58
47.	Consumers Legal Remedies Act: Damages – For Plaintiff Schmitt	<i>Chowning v. Kohl's Dep't Stores, Inc.</i> , 735 Fed. Appx. 924, 924-25, n. 1 (2018) (citing <i>Colgan v. Leatherman Tool Grp., Inc.</i> , 135 Cal.App.4th 663 (2006))	61
48.	Consumers Legal Remedies Act: Damages – For California Class	<i>Chowning v. Kohl's Dep't Stores, Inc.</i> , 735 Fed. Appx. 924, 924-25, n. 1 (2018) (citing <i>Colgan v. Leatherman Tool Grp., Inc.</i> , 135 Cal.App.4th 663 (2006)).	62

1	49.a	Ohio Implied Warranty	Ohio Civil Jury Instructions, 1 505 OJI CV 505.13	63
2	49.b	Ohio Implied Warranty	Ohio Civil Jury Instructions, 1 505 OJI CV 505.13	63
3	50.a	Ohio Express Warranty	Ohio Civil Jury Instructions, 1 505 OJI CV 505.11	64
4	50.b	Ohio Express Warranty	Ohio Civil Jury Instructions, 1 505 OJI CV 505.11	65
5	51.a	Ohio Buyer's Damages for Breach of Warranty of Accepted Goods	Ohio Civil Jury Instructions, 1 505 OJI CV 505.45	68
6	51.b	Ohio Buyer's Damages for Breach of Warranty of Accepted Goods	Ohio Civil Jury Instructions, 1 505 OJI CV 505.45	68
7	52.a	Magnuson-Moss Warranty Claims	<i>Clemens v. DaimlerChrysler Corp.</i> , 534 F.3d 1017, 1022 (9th Cir. 2008)	70
8	52.b	Magnuson-Moss Warranty Claims	<i>Clemens v. DaimlerChrysler Corp.</i> , 534 F.3d 1017, 1022 (9th Cir. 2008); Doc. 136 Order on Summary Judgment at page 14.	70
9	53.a	Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") Elements	3 Florida Forms of Jury Instruction § 65.80; <i>Urling v. Helms Exterminators, Inc.</i> , 468 So. 2d 451, 453 (Fla. Dist. Ct. App. 1985); <i>Trans World Accounts, Inc. v FTC</i> , 594 F.2d 212 (9th Cir. 1979)	71
10	53.b	Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") Elements	3 Florida Forms of Jury Instruction § 65.80; <i>Urling v. Helms Exterminators, Inc.</i> , 468 So. 2d 451, 453 (Fla. Dist. Ct. App. 1985); <i>Trans World Accounts, Inc. v FTC</i> , 594 F.2d 212 (9th Cir. 1979)	72
11	54.a	Florida Deceptive and Unfair Trade Practices Act: Damages	<i>Rollins, Inc. v. Butland</i> , 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006)	75
12	54.b	Florida Deceptive and Unfair Trade Practices Act: Damages	<i>Rollins, Inc. v. Butland</i> , 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006)	75
13	55.	Affirmative Defense—Statute of Limitations	Judicial Council of California Civil Jury Instructions No. 338	76
14	56.	Affirmative Defense - Standing	<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555, 560-61 and n.1 (1992)	77
15	57.	Affirmative Defense –	Judicial Council of California	78

1		Compliance	Civil Jury Instructions No. 4207 (for good faith); <i>Troyk v. Farmers Group, Inc.</i> , 171 Cal.App.4th 1305, 1332-3 (2009) (for compliance).	
2	58.	Affirmative Defense – Laches	<i>Jarrow Formulas, Inc. v. Nutrition Now, Inc.</i> , 304 F.3d 829, 835 (9th Cir. 2002).	79
3	59.	Affirmative Defense - Unjust Enrichment	<i>Lectrodryer v. Seoulbank</i> , 77 Cal.App.4th 723, 726 (2000); <i>accord, Media Services Group, Inc. v. Bay Cities Comm., Inc.</i> , 237 F.3d 1326, 1330-31 (11th Cir. 2001)	80
4	60.	Affirmative Defense - Offset	<i>Garg v. People ex rel. State Bd. of Equalization</i> , 53 Cal.App.4th 199, 211-12 (1997); citing <i>Jess v. Herrmann</i> , 26 Cal.3d 131, 142 (1979)	81

INSTRUCTION NO. 1

Duty of Jury

Members of the jury: You are now the jury in this case. It is my duty to instruct you on the law.

These instructions are preliminary instructions to help you understand the principles that apply to civil trials and to help you understand the evidence as you listen to it. You will be allowed to keep this set of instructions to refer to throughout the trial. These instructions are not to be taken home and must remain in the jury room when you leave in the evenings. At the end of the trial, these instructions will be collected and I will give you a final set of instructions. It is the final set of instructions that will govern your deliberations.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it

to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

Please do not read into these instructions or anything I may say or do that I have an opinion regarding the evidence or what your verdict should be.

Source: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.2, without change.

PROPOSED BY: BOTH PLAINTIFFS AND
DEFENDANT

GIVEN AS PROPOSED _____

GIVEN AS MODIFIED _____

GIVEN ON COURT'S OWN _____

MOTION

REFUSED _____

WITHDRAWN _____

INSTRUCTION NO. 2

Duty of Jury

(Court reads and provides written instructions at end of case)

Members of the Jury: Now that you have heard all of the evidence and the arguments of the attorneys, it is my duty to instruct you on the law that applies to this case.

Each of you has received a copy of these instructions that you may take with you to the jury room to consult during your deliberations.

It is your duty to find the facts from all the evidence in the case. To those

1 facts you will apply the law as I give it to you. You must follow the law as I give it
2 to you whether you agree with it or not. And you must not be influenced by any
3 personal likes or dislikes, opinions, prejudices, or sympathy. That means that you
4 must decide the case solely on the evidence before you. You will recall that you
5 took an oath to do so.

6 Please do not read into these instructions or anything that I may say or do or
7 have said or done that I have an opinion regarding the evidence or what your verdict
8 should be.

9
10 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
11 Circuit No. 1.4, without substantive change.

12
13 **PROPOSED BY: BOTH PLAINTIFFS AND**
14 **DEFENDANT**

15 **GIVEN AS PROPOSED** _____

16 **GIVEN AS MODIFIED** _____

17 **GIVEN ON COURT'S OWN** _____

18 **MOTION**

19 **REFUSED** _____

20 **WITHDRAWN** _____

21
22 **INSTRUCTION NO. 3**

23 **Claims And Defenses**

24 **3.a Plaintiffs' Proposed Modified Instruction.**

25 To help you follow the evidence, I will give you a brief summary of the
26 positions of the parties:

1 The plaintiffs assert that **Younique sold Moodstruck 3d Fiber Lashes for**
2 **\$29 and claimed that the lashes were made of “Natural Fibers” and “100%**
3 **Natural Green Tea Fibers” but the fibers were neither. Plaintiffs have asserted**
4 **this claim under the laws of California as well as Ohio and Florida. Later**
5 **instructions will address the exact claims.** The plaintiffs have the burden of
6 proving these claims.

7 The defendant denies those claims and also contends that **Plaintiffs’ and the**
8 **Class claims are barred by (1) the statute of limitations, (2) lack of standing, (3)**
9 **Younique’s compliance with law, (4) the doctrine of laches, (5) Plaintiffs’**
10 **failure to mitigate damages, (6) the doctrine of unjust enrichment, and/or (6)**
11 **the defense of offset.** ~~{defendant’s counterclaims and/or affirmative defenses}~~.

12 ~~{The defendant Younique has the burden of proof on these {counterclaims and/or~~
13 ~~affirmative defenses.}}~~

14 ~~{The plaintiff Plaintiffs deny Younique’s {defendant’s counterclaims and/or~~
15 ~~affirmative defenses}.}~~

16
17 **3.b Defendant’s Proposed Modified Instruction.**

18 To help you follow the evidence, I will give you a brief summary of the
19 positions of the parties:

20 The plaintiffs assert that **Younique sold Moodstruck 3d Fiber Lashes for**
21 **\$29 and claimed that the lashes were made of “Natural Fibers” and “100%**
22 **Natural Green Tea Fibers” but the fibers were really ground up nylon.**
23 **Plaintiffs have asserted this claim under the laws of California as well as Ohio**
24 **and Florida. Later instructions will address the exact claims.** The plaintiffs
25 have the burden of proving these claims.

26 The defendant denies those claims and also contends that **Plaintiffs’ and the**
27 **Class claims are barred by (1) the statute of limitations, (2) lack of standing, (3)**
28

1 **Younique's compliance with law, (4) the doctrine of laches, (5) Plaintiffs'**
2 **failure to mitigate damages, (6) the doctrine of unjust enrichment, and/or (6)**
3 **the defense of offset. ~~[defendant's counterclaims and/or affirmative defenses]~~.**

4 ~~[The defendant Younique has the burden of proof on these counterclaims and/or~~
5 ~~affirmative defenses.]~~

6 ~~[The plaintiff Plaintiffs deny Younique's defendant's counterclaims and/or~~
7 ~~affirmative defenses.]~~

8
9 **Original:**

10 To help you follow the evidence, I will give you a brief summary of the
11 positions of the parties:

12 The plaintiff asserts that [plaintiff's claims]. The plaintiff has the burden of
13 proving these claims.

14 The defendant denies those claims [and also contends that [defendant's
15 counterclaims and/or affirmative defenses]]. [The defendant has the burden of proof
16 on these [counterclaims and/or affirmative defenses.]]

17 [The plaintiff denies [defendant's counterclaims and/or affirmative
18 defenses].]

19
20 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
21 Circuit No. 1.5.

22
23 **PROPOSED BY:** _____

24 **GIVEN AS PROPOSED** _____

25 **GIVEN AS MODIFIED** _____

26 **GIVEN ON COURT'S OWN** _____

27 **MOTION**

1 REFUSED _____

2 WITHDRAWN _____

3
4 **INSTRUCTION NO. 4**

5 **Burden of Proof—Preponderance of the Evidence**

6 When a party has the burden of proving any claim **or affirmative defense** by
7 a preponderance of the evidence, it means you must be persuaded by the evidence
8 that the claim or affirmative defense is more probably true than not true.

9 You should base your decision on all of the evidence, regardless of which
10 party presented it.

11
12 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
13 Circuit No. 1.6, without substantive change.

14
15 **PROPOSED BY: BOTH PLAINTIFFS AND**
16 **DEFENDANT**

17 GIVEN AS PROPOSED _____

18 GIVEN AS MODIFIED _____

19 GIVEN ON COURT'S OWN _____

20 MOTION

21 REFUSED _____

22 WITHDRAWN _____

23
24 **INSTRUCTION NO. 5**

25 **Burden of Proof—Clear and Convincing Evidence**

26 When a party has the burden of proving any claim or defense by clear and
27 convincing evidence, it means that the party must present evidence that leaves you
28

1 with a firm belief or conviction that it is highly probable that the factual contentions
2 of the claim or defense are true. This is a higher standard of proof than proof by a
3 preponderance of the evidence, but it does not require proof beyond a reasonable
4 doubt.

5
6 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
7 Circuit No. 1.7, without change.

8 **PROPOSED BY: BOTH PLAINTIFFS AND DEFENDANT**

9 **(Plaintiffs disagree on order of this instruction and believe it should follow**
10 **punitive damages)**

11 GIVEN AS PROPOSED _____

12 GIVEN AS MODIFIED _____

13 GIVEN ON COURT'S OWN _____

14 MOTION

15 REFUSED _____

16 WITHDRAWN _____

17
18 **INSTRUCTION NO. 6**

19 **Class Action Defined**

20 **Modified:**

21 A class action is a lawsuit that has been brought by one or more plaintiffs on
22 behalf of a larger group of people who have similar legal claims. All of these people
23 together are called a “class.” **Plaintiffs Schmitt, Brun, and Reilly** bring this action
24 as the class representatives.

25 In a class action, the claims of many individuals can be resolved at the same
26 time instead of requiring each member to sue separately. Because of the large
27 number of claims that are at issue in this case, not everyone in the class will testify.

1 You may assume that the evidence at this [stage of the] trial applies to all class
2 members [except as I specifically tell you otherwise]. All members of the class will
3 be bound by the result of this trial.

4 In this case, the class(es) consist(s) of the following:

5 **(1) California Class. All California consumers who purchased stand-**
6 **alone Moodstruck 3D Fiber Lashes between October 2012 and July 2015 for**
7 **personal, family, or household use.**

8 **(2) Ohio Class. All Ohio consumers who purchased stand-alone**
9 **Moodstruck 3D Fiber Lashes between October 2012 and July 2015 for**
10 **personal, family, or household use.**

11 **(3) Florida Class. All Florida consumers who purchased stand-alone**
12 **Moodstruck 3D Fiber Lashes between October 2012 and July 2015 for**
13 **personal, family, or household use.**

14
15 **Original:**

16 A class action is a lawsuit that has been brought by one or more plaintiffs on
17 behalf of a larger group of people who have similar legal claims. All of these people
18 together are called a “class.” [Name of plaintiff] brings this action as the class
19 representative.

20 In a class action, the claims of many individuals can be resolved at the same
21 time instead of requiring each member to sue separately. Because of the large
22 number of claims that are at issue in this case, not everyone in the class will testify.

23 You may assume that the evidence at this [stage of the] trial applies to all class
24 members [except as I specifically tell you otherwise]. All members of the class will
25 be bound by the result of this trial.

26 In this case, the class(es) consist(s) of the following:
27 [Describe each class]

1 **Source:** Judicial Council of California Civil Jury Instructions No. 338

2 PROPOSED BY: BOTH PLAINTIFFS AND
3 DEFENDANT

4 GIVEN AS PROPOSED _____

5 GIVEN AS MODIFIED _____

6 GIVEN ON COURT'S OWN _____

7 MOTION

8 REFUSED _____

9 WITHDRAWN _____

10
11 **INSTRUCTION NO. 7**

12 **Materiality Defined**

13 It is Plaintiffs' burden to show that there was uniform, Class-wide exposure to
14 the Moodstruck 3D Fiber Lashes label. A consumer who was not exposed to the
15 label cannot recover.
16

17 **Source:** *Mazza v. Am. Honda Motor Co. Inc.*, 666 F.3d 581, 596 (9th Cir. 2012)

18
19 PROPOSED BY: **DEFENDANT**
20 **ONLY**

21 GIVEN AS PROPOSED _____

22 GIVEN AS MODIFIED _____

23 GIVEN ON COURT'S OWN _____

24 MOTION

25 REFUSED _____

26 WITHDRAWN _____

INSTRUCTION NO. 8

Class-wide Materiality

It is Plaintiffs' burden to show that a material misrepresentation was made to the entire Class.

Source: *Massachusetts Mut. Life Ins. Co. v. Superior Court*, 97 Cal.App.4th 1282 (2002)

PROPOSED BY: DEFENDANT

ONLY

GIVEN AS PROPOSED _____

GIVEN AS MODIFIED _____

GIVEN ON COURT'S OWN _____

MOTION

REFUSED _____

WITHDRAWN _____

INSTRUCTION NO. 9

Class-wide Exposure

It is Plaintiffs' burden to show that there was uniform, Class-wide exposure to the Moodstruck 3D Fiber Lashes label. A consumer who was not exposed to the label cannot recover.

Source: *Mazza v. Am. Honda Motor Co. Inc.*, 666 F.3d 581, 596 (9th Cir. 2012)

PROPOSED BY: DEFENDANT

ONLY

GIVEN AS PROPOSED _____

GIVEN AS MODIFIED _____

1 GIVEN ON COURT'S OWN _____
2 MOTION
3 REFUSED _____
4 WITHDRAWN _____
5

6 **INSTRUCTION NO. 10**

7 **What is evidence**

8 The evidence you are to consider in deciding what the facts are consists of:

- 9 1. the sworn testimony of any witness;
10 2. the exhibits that are admitted into evidence;
11 3. any facts to which the lawyers have agreed; and
12 4. any facts that I [may instruct] [have instructed] you to accept as
13 proved.
14

15 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
16 Circuit No. 1.9, without change.
17

18 **PROPOSED BY: BOTH PLAINTIFFS AND**
19 **DEFENDANT**

20 GIVEN AS PROPOSED _____
21 GIVEN AS MODIFIED _____
22 GIVEN ON COURT'S OWN _____
23 MOTION
24 REFUSED _____
25 WITHDRAWN _____
26
27
28

INSTRUCTION NO. 11

What is not evidence.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they **may say** in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

3. Testimony that is excluded or stricken, or that you **are** instructed to disregard, is not evidence and must not be considered. In addition some evidence **may be** received only for a limited purpose; when I **instruct** you to consider certain evidence only for a limited purpose, you must do so and you may not consider that evidence for any other purpose.

4. Anything you may **see or hear** when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Source: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 1.10, without change.

**PROPOSED BY: BOTH PLAINTIFFS AND
DEFENDANT**

1 GIVEN AS PROPOSED _____
2 GIVEN AS MODIFIED _____
3 GIVEN ON COURT'S OWN _____
4 MOTION
5 REFUSED _____
6 WITHDRAWN _____

8 **INSTRUCTION NO. 12**

9 **Evidence for a limited purpose.**

10 Some evidence may be admitted only for a limited purpose.

11 When I instruct you that an item of evidence has been admitted only for a
12 limited purpose, you must consider it only for that limited purpose and not for any
13 other purpose.

14
15 [The testimony [you are about to hear] [you have just heard] may be considered only
16 for the limited purpose of *describe purpose* and not for any other purpose.]¹

17
18 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
19 Circuit No. 1.11, without change.

20
21 **PROPOSED BY: BOTH PLAINTIFFS AND**
22 **DEFENDANT**

23 GIVEN AS PROPOSED _____
24 GIVEN AS MODIFIED _____
25 GIVEN ON COURT'S OWN _____
26 MOTION

27 _____
28 ¹ Instruction to be given when applicable.

1 REFUSED _____

2 WITHDRAWN _____

3

4

INSTRUCTION NO. 13

5

Direct and Circumstantial Evidence

6 Evidence may be direct or circumstantial. Direct evidence is direct proof of a
7 fact, such as testimony by a witness about what that witness personally saw or heard
8 or did. Circumstantial evidence is proof of one or more facts from which you could
9 find another fact. You should consider both kinds of evidence. The law makes no
10 distinction between the weight to be given to either direct or circumstantial
11 evidence. It is for you to decide how much weight to give to any evidence.

12 **By way of example, if you wake up in the morning and see that the**
13 **sidewalk is wet, you may find from that fact that it rained during the night.**
14 **However, other evidence, such as a turned on garden hose, may provide a**
15 **different explanation for the presence of water on the sidewalk. Therefore,**
16 **before you decide that a fact has been proved by circumstantial evidence, you**
17 **must consider all the evidence in the light of reason, experience and common**
18 **sense.²**

19

20 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
21 Circuit No. 1.12.

22

23 PROPOSED BY: BOTH PLAINTIFFS AND

24 DEFENDANT

25 GIVEN AS PROPOSED _____

26 GIVEN AS MODIFIED _____

27

28 ² Hypothetical given in model civil jury instructions.

1 GIVEN ON COURT'S OWN _____
2 MOTION
3 REFUSED _____
4 WITHDRAWN _____
5

6 **INSTRUCTION NO. 14**

7 **Ruling on Objections.**

8 There are rules of evidence that control what can be received into evidence.
9 When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the
10 other side thinks that it is not permitted by the rules of evidence, that lawyer may
11 object. If I overrule the objection, the question may be answered or the exhibit
12 received. If I sustain the objection, the question cannot be answered, and the exhibit
13 cannot be received. Whenever I sustain an objection to a question, you must ignore
14 the question and must not guess what the answer might have been.

15 Sometimes I may order that evidence be stricken from the record and that you
16 disregard or ignore that evidence. That means when you are deciding the case, you
17 must not consider the stricken evidence for any purpose.
18

19 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
20 Circuit No. 1.13, without change.
21

22 **PROPOSED BY: BOTH PLAINTIFFS AND**
23 **DEFENDANT**

24 GIVEN AS PROPOSED _____
25 GIVEN AS MODIFIED _____
26 GIVEN ON COURT'S OWN _____
27 MOTION
28

1 REFUSED _____

2 WITHDRAWN _____

3

4

INSTRUCTION NO. 15

5

Credibility of Witnesses

6

7

8

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

9

In considering the testimony of any witness, you may take into account:

10

11

1. the opportunity and ability of the witness to see or hear or know the things testified to;

12

2. the witness's memory;

13

3. the witness's manner while testifying;

14

4. the witness's interest in the outcome of the case, if any;

15

5. the witness's bias or prejudice, if any;

16

6. whether other evidence contradicted the witness's testimony;

17

7. the reasonableness of the witness's testimony in light of all the evidence;

18

and

19

8. any other factors that bear on believability.

20

21

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

26

27

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness

28

1 said. On the other hand, if you think the witness testified untruthfully about some
2 things but told the truth about others, you may accept the part you think is true and
3 ignore the rest.

4 The weight of the evidence as to a fact does not necessarily depend on the
5 number of witnesses who testify. What is important is how believable the witnesses
6 were, and how much weight you think their testimony deserves.

7
8 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
9 Circuit No. 1.14, without change.

10
11 **PROPOSED BY: BOTH PLAINTIFFS AND**

12 **DEFENDANT**

13 **GIVEN AS PROPOSED** _____

14 **GIVEN AS MODIFIED** _____

15 **GIVEN ON COURT'S OWN** _____

16 **MOTION**

17 **REFUSED** _____

18 **WITHDRAWN** _____

19
20 **INSTRUCTION NO. 16**

21 **Conduct of the Jury**

22 I will now say a few words about your conduct as jurors.

23 First, keep an open mind throughout the trial, and do not decide what the
24 verdict should be until you and your fellow jurors have completed your deliberations
25 at the end of the case.

26 Second, because you must decide this case based only on the evidence
27 received in the case and on my instructions as to the law that applies, you must not

1 be exposed to any other information about the case or to the issues it involves during
2 the course of your jury duty. Thus, until the end of the case or unless I tell you
3 otherwise:

4 Do not communicate with anyone in any way and do not let anyone else
5 communicate with you in any way about the merits of the case or anything to do
6 with it. This includes discussing the case in person, in writing, by phone or
7 electronic means, via email, text messaging, or any internet chat room, blog, website
8 or application, including but not limited to Facebook, YouTube, Twitter, Instagram,
9 LinkedIn, Snapchat, or any other forms of social media. This applies to
10 communicating with your fellow jurors until I give you the case for deliberation, and
11 it applies to communicating with everyone else including your family members,
12 your employer, the media or press, and the people involved in the trial, although you
13 may notify your family and your employer that you have been seated as a juror in
14 the case, and how long you expect the trial to last. But, if you are asked or
15 approached in any way about your jury service or anything about this case, you must
16 respond that you have been ordered not to discuss the matter and report the contact
17 to the court.

18 Because you will receive all the evidence and legal instruction you properly
19 may consider to return a verdict: do not read, watch or listen to any news or media
20 accounts or commentary about the case or anything to do with it [although I have no
21 information that there will be news reports about this case]; do not do any research,
22 such as consulting dictionaries, searching the Internet, or using other reference
23 materials; and do not make any investigation or in any other way try to learn about
24 the case on your own. Do not visit or view any place discussed in this case, and do
25 not use Internet programs or other devices to search for or view any place discussed
26 during the trial. Also, do not do any research about this case, the law, or the people
27 involved—including the parties, the witnesses or the lawyers—until you have been
28

1 excused as jurors. If you happen to read or hear anything touching on this case in the
2 media, turn away and report it to me as soon as possible.

3 These rules protect each party's right to have this case decided only on
4 evidence that has been presented here in court. Witnesses here in court take an oath
5 to tell the truth, and the accuracy of their testimony is tested through the trial
6 process. If you do any research or investigation outside the courtroom, or gain any
7 information through improper communications, then your verdict may be influenced
8 by inaccurate, incomplete or misleading information that has not been tested by the
9 trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if
10 you decide the case based on information not presented in court, you will have
11 denied the parties a fair trial. Remember, you have taken an oath to follow the rules,
12 and it is very important that you follow these rules.

13 A juror who violates these restrictions jeopardizes the fairness of these
14 proceedings, **and a mistrial could result that would require the entire trial**
15 **process to start over.** If any juror is exposed to any outside information, please
16 notify the court immediately.

17
18 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
19 Circuit No. 1.15.

20
21 **PROPOSED BY: BOTH PLAINTIFFS AND**
22 **DEFENDANT**

23 **GIVEN AS PROPOSED** _____

24 **GIVEN AS MODIFIED** _____

25 **GIVEN ON COURT'S OWN** _____

26 **MOTION**

27 **REFUSED** _____

1 WITHDRAWN _____

2
3 **INSTRUCTION NO. 17**

4 **Publicity During Trial**

5 If there is any news media account or commentary about the case or anything to do
6 with it, you must ignore it. You must not read, watch or listen to any news media
7 account or commentary about the case or anything to do with it. The case must be
8 decided by you solely and exclusively on the evidence that will be received in the
9 case and on my instructions as to the law that applies. If any juror is exposed to any
10 outside information, please notify me immediately.

11
12 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
13 Circuit No. 1.16, without change.

14
15 **PROPOSED BY: BOTH PLAINTIFFS AND**
16 **DEFENDANT**

17 **GIVEN AS PROPOSED** _____

18 **GIVEN AS MODIFIED** _____

19 **GIVEN ON COURT'S OWN** _____

20 **MOTION**

21 **REFUSED** _____

22 **WITHDRAWN** _____

23
24 **INSTRUCTION NO. 18**

25 **Taking Notes**

26 If you wish, you may take notes to help you remember the evidence. If you do
27 take notes, please keep them to yourself until you go to the jury room to decide the

1 case. Do not let notetaking distract you. When you leave, your notes should be left
2 in the **envelope in the jury room**. No one will read your notes.

3 Whether or not you take notes, you should rely on your own memory of the
4 evidence. Notes are only to assist your memory. You should not be overly
5 influenced by your notes or those of other jurors.

6
7 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
8 Circuit No. 1.18.

9
10 **PROPOSED BY: BOTH PLAINTIFFS AND**
11 **DEFENDANT**

12 **GIVEN AS PROPOSED** _____

13 **GIVEN AS MODIFIED** _____

14 **GIVEN ON COURT'S OWN** _____

15 **MOTION**

16 **REFUSED** _____

17 **WITHDRAWN** _____

18
19 **INSTRUCTION NO. 19**

20 **Bench Conferences and Recesses**

21 From time to time during the trial, it **may become** necessary for me to talk
22 with the attorneys out of the hearing of the jury, either by having a conference at the
23 bench when the jury **is** present in the courtroom, or by calling a recess. Please
24 understand that while you **are** waiting, we **are** working. The purpose of these
25 conferences is not to keep relevant information from you, but to decide how certain
26 evidence is to be treated under the rules of evidence and to avoid confusion and
27 error.

1 Of course, we **will do** what we **can** to keep the number and length of these
2 conferences to a minimum. I **may** not always grant an attorney's request for a
3 conference. Do not consider my granting or denying a request for a conference as
4 any indication of my opinion of the case or of what your verdict should be.

5
6 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
7 Circuit No. 1.20.

8
9 **PROPOSED BY: BOTH PLAINTIFFS AND**

10 **DEFENDANT**

11 **GIVEN AS PROPOSED** _____

12 **GIVEN AS MODIFIED** _____

13 **GIVEN ON COURT'S OWN** _____

14 **MOTION**

15 **REFUSED** _____

16 **WITHDRAWN** _____

17
18 **INSTRUCTION NO. 20**

19 **Outline of Trial**

20 Trials proceed in the following way: First, each side may make an opening
21 statement. An opening statement is not evidence. It is simply an outline to help you
22 understand what that party expects the evidence will show. A party is not required to
23 make an opening statement.

24 The plaintiffs will then present evidence, and counsel for the defendant may
25 cross-examine. Then the defendant may present evidence, and counsel for the
26 plaintiffs may cross-examine.

27 After the evidence has been presented, I will instruct you on the law that
28

1 applies to the case and the attorneys will make closing arguments.

2 After that, you will go to the jury room to deliberate on your verdict.

3
4 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
5 Circuit No. 1.21.

6
7 **PROPOSED BY: BOTH PLAINTIFFS AND**
8 **DEFENDANT**

9 **GIVEN AS PROPOSED** _____

10 **GIVEN AS MODIFIED** _____

11 **GIVEN ON COURT'S OWN** _____

12 **MOTION**

13 **REFUSED** _____

14 **WITHDRAWN** _____

15
16 **INSTRUCTION NO. 21**

17 **Stipulated Testimony**

18 The parties have agreed what [witness]'s testimony would be if called as a
19 witness. You should consider that testimony in the same way as if it had been given
20 here in court.

21
22 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
23 Circuit No. 2.1, without change.

24
25 **PROPOSED BY: BOTH PLAINTIFFS AND**
26 **DEFENDANT**

27 **GIVEN AS PROPOSED** _____

1 GIVEN AS MODIFIED _____
2 GIVEN ON COURT'S OWN _____
3 MOTION
4 REFUSED _____
5 WITHDRAWN _____

8 **INSTRUCTION NO. 22**

9 **Stipulations of Fact**

10 The parties have agreed to certain facts [to be placed in evidence as Exhibit
11 ____] [that will be read to you]. You must therefore treat these facts as having been
12 proved.

13
14 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
15 Circuit No. 2.2, without change.

16
17 **PROPOSED BY: BOTH PLAINTIFFS AND**
18 **DEFENDANT**

19 GIVEN AS PROPOSED _____
20 GIVEN AS MODIFIED _____
21 GIVEN ON COURT'S OWN _____
22 MOTION
23 REFUSED _____
24 WITHDRAWN _____

1 **INSTRUCTION NO. 23**

2 **Judicial Notice**

3 The court has decided to accept as proved the fact that **[state fact]**. You must
4 accept this fact as true.

5
6 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
7 Circuit No. 2.3, without change.

8
9 **PROPOSED BY: BOTH PLAINTIFFS AND**

10 **DEFENDANT**

11 **GIVEN AS PROPOSED** _____

12 **GIVEN AS MODIFIED** _____

13 **GIVEN ON COURT'S OWN** _____

14 **MOTION**

15 **REFUSED** _____

16 **WITHDRAWN** _____

17
18 **INSTRUCTION NO. 24**

19 **Deposition In Lieu of Live Testimony**

20 **Modified:**

21 A deposition is the sworn testimony of a witness taken before trial. The
22 witness is placed under oath to tell the truth and lawyers for each party may ask
23 questions. The questions and answers are recorded. When a person is unavailable
24 to testify at trial, the deposition of that person may be used at the trial.

25 ~~The deposition of [name of witness] was taken on [date].~~ Insofar as possible,
26 you should consider deposition testimony, presented to you in court in lieu of live
27 testimony, in the same way as if the witness had been present to testify.

1 Do not place any significance on the behavior or tone of voice of any person
2 reading the questions or answers.

3
4 **Original:**

5 A deposition is the sworn testimony of a witness taken before trial. The
6 witness is placed under oath to tell the truth and lawyers for each party may ask
7 questions. The questions and answers are recorded. When a person is unavailable
8 to testify at trial, the deposition of that person may be used at the trial.

9 The deposition of [*name of witness*] was taken on [*date*]. Insofar as possible,
10 you should consider deposition testimony, presented to you in court in lieu of live
11 testimony, in the same way as if the witness had been present to testify.

12 Do not place any significance on the behavior or tone of voice of any person
13 reading the questions or answers.

14
15 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
16 Circuit No. 2.4.

17
18 **PROPOSED BY: BOTH PLAINTIFFS AND**
19 **DEFENDANT**

20 GIVEN AS PROPOSED _____
21 GIVEN AS MODIFIED _____
22 GIVEN ON COURT'S OWN _____
23 MOTION _____
24 REFUSED _____
25 WITHDRAWN _____

INSTRUCTION NO. 25

Impeachment Evidence - Witness

The evidence that a witness has lied under oath on a prior occasion may be considered, along with all other evidence, in deciding whether or not to believe the witness and how much weight to give the testimony of the witness and for no other purpose.

Source: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.9.

PROPOSED BY: BOTH PLAINTIFFS AND
DEFENDANT

GIVEN AS PROPOSED _____

GIVEN AS MODIFIED _____

GIVEN ON COURT'S OWN _____

MOTION

REFUSED _____

WITHDRAWN _____

INSTRUCTION NO. 26

Use of Interrogatories of a Party

Evidence [will now be] [was] presented to you in the form of answers of one of the parties to written interrogatories submitted by the other side. These answers were given in writing and under oath before the trial in response to questions that were submitted under established court procedures. You should consider the answers, insofar as possible, in the same way as if they were made from the witness stand.

Source: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.11, without change.

PROPOSED BY: BOTH PLAINTIFFS AND
DEFENDANT

GIVEN AS PROPOSED _____

GIVEN AS MODIFIED _____

GIVEN ON COURT'S OWN _____

MOTION

REFUSED _____

WITHDRAWN _____

INSTRUCTION NO. 27

Expert Opinion

You [have heard] [are about to hear] testimony from [*name*] who [testified] [will testify] to opinions and the reasons for his opinions. This opinion testimony is allowed, because of the education or experience of this witness.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Source: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.13, without change.

1 PROPOSED BY: BOTH PLAINTIFFS AND

2 DEFENDANT

3 GIVEN AS PROPOSED _____

4 GIVEN AS MODIFIED _____

5 GIVEN ON COURT'S OWN _____

6 MOTION

7 REFUSED _____

8 WITHDRAWN _____

9

10

INSTRUCTION NO. 28

11

Charts and Summaries Not Received in Evidence

12

Certain charts and summaries not admitted into evidence [may be] [have been] shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

17

18

Source: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.14, without change.

20

21

PROPOSED BY: BOTH PLAINTIFFS AND

22

DEFENDANT

23

GIVEN AS PROPOSED _____

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GIVEN AS MODIFIED _____

25

GIVEN ON COURT'S OWN _____

26

MOTION

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REFUSED _____

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1 WITHDRAWN _____

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INSTRUCTION NO. 29

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Charts and Summaries in Evidence

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Certain charts and summaries [may be] [have been] admitted into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the testimony or other admitted evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

Source: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.15, without change.

PROPOSED BY: BOTH PLAINTIFFS AND
DEFENDANT

GIVEN AS PROPOSED _____

GIVEN AS MODIFIED _____

GIVEN ON COURT'S OWN _____

MOTION

REFUSED _____

WITHDRAWN _____

INSTRUCTION NO. 30

Evidence in Electronic Format

Those exhibits received in evidence that are capable of being displayed electronically will be provided to you in that form, and you will be able to view them in the jury room. A computer, projector, printer and accessory equipment will

1 be available to you in the jury room.

2 A court technician will show you how to operate the computer and other
3 equipment; how to locate and view the exhibits on the computer; and how to print
4 the exhibits. You will also be provided with a paper list of all exhibits received in
5 evidence. You may request a paper copy of any exhibit received in evidence by
6 sending a note through the [clerk] [bailiff].) If you need additional equipment or
7 supplies or if you have questions about how to operate the computer or other
8 equipment, you may send a note to the [clerk] [bailiff], signed by your foreperson or
9 by one or more members of the jury. Do not refer to or discuss any exhibit you
10 were attempting to view.

11 If a technical problem or question requires hands-on maintenance or
12 instruction, a court technician may enter the jury room with [the clerk] [the bailiff]
13 present for the sole purpose of assuring that the only matter that is discussed is the
14 technical problem. When the court technician or any nonjuror is in the jury room,
15 the jury shall not deliberate. No juror may say anything to the court technician or
16 any nonjuror other than to describe the technical problem or to seek information
17 about operation of the equipment. Do not discuss any exhibit or any aspect of the
18 case.

19 The sole purpose of providing the computer in the jury room is to enable
20 jurors to view the exhibits received in evidence in this case. You may not use the
21 computer for any other purpose. At my direction, technicians have taken steps to
22 ensure that the computer does not permit access to the Internet or to any “outside”
23 website, database, directory, game, or other material. Do not attempt to alter the
24 computer to obtain access to such materials. If you discover that the computer
25 provides or allows access to such materials, you must inform the court immediately
26 and refrain from viewing such materials. Do not remove the computer or any
27 electronic data from the jury room, and do not copy any such data.

28

Source: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 2.16, without change.

PROPOSED BY: BOTH PLAINTIFFS AND
DEFENDANT

GIVEN AS PROPOSED _____

GIVEN AS MODIFIED _____

GIVEN ON COURT'S OWN _____

MOTION

REFUSED _____

WITHDRAWN _____

INSTRUCTION NO. 31

Duty to Deliberate

Before you begin your deliberations, elect one member of the jury as your presiding juror. The presiding juror will preside over the deliberations and serve as the spokesperson for the jury in court.

You shall diligently strive to reach agreement with all of the other jurors if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to their views.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not be unwilling to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right,

1 or change an honest belief about the weight and effect of the evidence simply to
2 reach a verdict.

3
4 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
5 Circuit No. 3.1, without change.

6
7 **PROPOSED BY: BOTH PLAINTIFFS AND**
8 **DEFENDANT**

9 GIVEN AS PROPOSED _____

10 GIVEN AS MODIFIED _____

11 GIVEN ON COURT'S OWN _____

12 MOTION

13 REFUSED _____

14 WITHDRAWN _____

15
16
17 **INSTRUCTION NO. 32**

18 **Communication with Court**

19 If it becomes necessary during your deliberations to communicate with me,
20 you may send a note through the [clerk] [bailiff], signed by any one or more of you.
21 No member of the jury should ever attempt to communicate with me except by a
22 signed writing. I will not communicate with any member of the jury on anything
23 concerning the case except in writing or here in open court. If you send out a
24 question, I will consult with the lawyers before answering it, which may take some
25 time. You may continue your deliberations while waiting for the answer to any
26 question. Remember that you are not to tell anyone—including the court—how the
27 jury stands, whether in terms of vote count or otherwise, until after you have
28

1 reached a unanimous verdict or have been discharged.

2
3 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
4 Circuit No. 3.3, without change.

5
6 PROPOSED BY: BOTH PLAINTIFFS AND
7 DEFENDANT

8 GIVEN AS PROPOSED _____

9 GIVEN AS MODIFIED _____

10 GIVEN ON COURT'S OWN _____

11 MOTION

12 REFUSED _____

13 WITHDRAWN _____

14
15 **INSTRUCTION NO. 33**

16 **Return of Verdict Form**

17 A verdict form has been prepared for you. *[Explain verdict form as needed.]*

18 After you have reached unanimous agreement on a verdict, your presiding juror
19 should complete the verdict form according to your deliberations, sign and date it,
20 and advise the [clerk] [bailiff] that you are ready to return to the courtroom.

21
22 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
23 Circuit No. 3.5.

24
25 PROPOSED BY: BOTH PLAINTIFFS AND
26 DEFENDANT

27 GIVEN AS PROPOSED _____

1 GIVEN AS MODIFIED _____
2 GIVEN ON COURT'S OWN _____
3 MOTION
4 REFUSED _____
5 WITHDRAWN _____

6

7

INSTRUCTION NO. 34

8

Corporations – Fair Treatment

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Modified:

10 All parties are equal before the law and a corporation [partnership] is entitled
11 to the same fair and conscientious consideration by you as any party.

12

13

Original:

14 All parties are equal before the law and a [corporation] [partnership] is
15 entitled to the same fair and conscientious consideration by you as any party.

16

17 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
18 Circuit No. 4.1.

19

20 PROPOSED BY: BOTH PLAINTIFFS AND
21 DEFENDANT

22 GIVEN AS PROPOSED _____
23 GIVEN AS MODIFIED _____
24 GIVEN ON COURT'S OWN _____
25 MOTION
26 REFUSED _____
27 WITHDRAWN _____

28

INSTRUCTION NO. 35

Liability of Corporations – Scope of Authority Not In Issue

Under the law, a corporation is considered to be a person. It can only act through its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of its employees, agents, and directors performed within the scope of authority.

Source: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.2, without change.

PROPOSED BY: BOTH PLAINTIFFS AND
DEFENDANT

GIVEN AS PROPOSED _____

GIVEN AS MODIFIED _____

GIVEN ON COURT'S OWN _____

MOTION

REFUSED _____

WITHDRAWN _____

INSTRUCTION NO. 36

Scope of Authority Defined

An agent is acting within the scope of authority if the agent is engaged in the performance of duties which were expressly or impliedly assigned to the agent by the principal.

Source: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.5, without change.

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PROPOSED BY: **PLAINTIFFS**
ONLY
GIVEN AS PROPOSED _____
GIVEN AS MODIFIED _____
GIVEN ON COURT'S OWN _____
MOTION
REFUSED _____
WITHDRAWN _____

INSTRUCTION NO. 37
Independent Contractor – Definition

An independent contractor is a person who performs services for another person under an express or implied agreement and who is not subject to the other’s control or, or right to control, the manner and means of performing the services.

One who engages an independent contractor is not liable to others for the acts of omissions of the independent contractor.

Source: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.14, without change.

PROPOSED BY: **DEFENDANT**
ONLY
GIVEN AS PROPOSED _____
GIVEN AS MODIFIED _____
GIVEN ON COURT'S OWN _____
MOTION

1 REFUSED _____

2 WITHDRAWN _____

3

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INSTRUCTION NO. 38

5

Agent and Principal--Definition

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An agent is a person who performs services for another person under an express or implied agreement and who is subject to the other's control or right to control the manner and means of performing the services. The other person is called a principal. **One may be an agent without receiving compensation for services. The agency agreement may be oral or written.**

Source: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit No. 4.4.

PROPOSED BY: PLAINTIFFS

ONLY

GIVEN AS PROPOSED _____

GIVEN AS MODIFIED _____

GIVEN ON COURT'S OWN _____

MOTION

REFUSED _____

WITHDRAWN _____

INSTRUCTION NO. 39
PRINCIPAL SUED BUT NOT AGENT—
AGENCY OR AUTHORITY DENIED

Modified:

The defendant **Younique** is sued as a principal. The plaintiff claims that **Senos Marketing Limited and/or Six Plus Trade Company** was acting as **Younique's** agent. **Younique** [denies that **Senos Marketing Limited and/or Six Plus Trade Company** was acting as **Younique's** agent] [admits that **Senos Marketing Limited and/or Six Plus Trade Company** was acting as **Younique's** agent] [and] [denies that **Senos Marketing Limited and/or Six Plus Trade Company** was acting within the scope of authority.]

If you find that **Senos Marketing Limited and/or Six Plus Trade Company** [was the agent of **Younique** and] was acting within the scope of authority, then any act or omission of **Senos Marketing Limited and/or Six Plus Trade Company** was the act or omission of **Younique**.

If you find that **Senos Marketing Limited and/or Six Plus Trade Company** was not acting within the scope of authority as **Younique's** agent, then you must find for **Younique**.

Original:

The defendant [*name of alleged principal*] is sued as a principal. The plaintiff claims that [*name of alleged agent*] was acting as [*name of alleged principal*]'s agent. [*Name of alleged principal*] [denies that [*name of alleged agent*] was acting as [*name of alleged principal*]'s agent] [admits that [*name of alleged agent*] was acting as [*name of alleged principal*]'s agent] [and] [denies that [*name of alleged*

1 agent] was acting within the scope of authority.]

2
3 If you find that [name of alleged agent] [was the agent of [name of alleged
4 principal] and] was acting within the scope of authority, then any act or omission of
5 [name of alleged agent] was the act or omission of [name of alleged principal].

6
7 If you find that [name of alleged agent] was not acting within the scope of
8 authority as [name of alleged principal]'s agent, then you must find for [name of
9 alleged principal].

10 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
11 Circuit No. 4.12.

12
13 **PROPOSED BY: PLAINTIFFS**

14 **ONLY**

15 GIVEN AS PROPOSED _____

16 GIVEN AS MODIFIED _____

17 GIVEN ON COURT'S OWN _____

18 MOTION

19 REFUSED _____

20 WITHDRAWN _____

21
22 **INSTRUCTION NO. 40**

23 **Ratification**

24 A purported principal who ratifies the acts of someone who was purporting to
25 act as the principal's agent will be liable for the acts of that purported agent,
26 provided that the principal made a conscious and affirmative decision to approve the
27 relevant acts of the purported agent while in possession of full and complete

1 knowledge of all relevant events.

2
3 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
4 Circuit No. 4.7.

5
6 **PROPOSED BY: PLAINTIFFS .**

7 **ONLY**

8 GIVEN AS PROPOSED _____

9 GIVEN AS MODIFIED _____

10 GIVEN ON COURT'S OWN _____

11 MOTION

12 REFUSED _____

13 WITHDRAWN _____

14
15 **INSTRUCTION NO. 41**

16 **Act of Agent is Act of Principal**

17 Any act or omission of an agent within the scope of authority is the act or
18 omission of the principal.

19
20 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
21 Circuit No. 4.8.

22
23 **PROPOSED BY: PLAINTIFFS**

24 **ONLY**

25 GIVEN AS PROPOSED _____

26 GIVEN AS MODIFIED _____

1 GIVEN ON COURT'S OWN _____
2 MOTION
3 REFUSED _____
4 WITHDRAWN _____
5
6

7 **INSTRUCTION NO. 42**

8 **Damages—Proof**

9 **42.a Plaintiffs' Proposed Modified Instruction.**

10 It is the duty of the Court to instruct you about the measure of damages. By
11 instructing you on damages, the Court does not mean to suggest for which party
12 your verdict should be rendered.

13 If you find for the plaintiff **on their claims** you must determine the plaintiffs'
14 damages. The plaintiff has the burden of proving damages by a preponderance of
15 the evidence. Damages means the amount of money that will reasonably and fairly
16 compensate the plaintiff for any injury you find was caused by the defendant. You
17 should consider the following:

18 **The testimony of the Plaintiffs**

19 **The testimony of the Defendant**

20 **The expert reports**

21 **The evidence presented at trial**

22 **Plaintiffs are seeking actual damages for themselves and the members of**
23 **the Classes. Unless you conclude that the Moodstruck 3D Fiber Lashes are**
24 **worthless, the measurement of damages is the difference between the \$29**
25 **purchase price and what the value of the lashes actually is if the lashes are not**
26 **“Natural Fibers” or “100% Natural Green Tea Fibers.”**

27 **It is for you to determine what damages, if any, have been proved.**
28

1 Your award must be based upon evidence and not upon speculation,
2 guesswork or conjecture.

3
4 **42.b Defendant's Proposed Modified Instruction.**

5 It is the duty of the Court to instruct you about the measure of damages. By
6 instructing you on damages, the Court does not mean to suggest for which party
7 your verdict should be rendered.

8 If you find for the plaintiffs **on their claims** you must determine the
9 plaintiffs' damages. The plaintiffs **have** the burden of proving damages by a
10 preponderance of the evidence. Damages means the amount of money that will
11 reasonably and fairly compensate the plaintiffs for any injury you find was caused
12 by the defendant. You should consider the following:

13 **Plaintiff Schmitt seeks actual damages for herself. The measure of**
14 **damages is the difference between what she paid for the Yunique Moodstruck**
15 **3D Fiber Lashes and the value of the Yunique Moodstruck 3D Fiber Lashes as**
16 **received if the lash component does not consist of "Natural Fibers" or "100%**
17 **Natural Green Tea Fibers."**

18 **Plaintiff Schmitt also brings this case on behalf of the California Class,**
19 **and seeks actual damages on its behalf. The measure of damages is the**
20 **difference between what the California Class paid for the Yunique**
21 **Moodstruck 3D Fiber Lashes and the value of the Yunique Moodstruck 3D**
22 **Fiber Lashes as received if the lash component does not consist of "Natural**
23 **Fibers" or "100% Natural Green Tea Fibers."**

24 **Plaintiff Brun seeks actual damages for herself. The measure of damages**
25 **is the difference between what she paid for the Yunique Moodstruck 3D Fiber**
26 **Lashes and the value of the Yunique Moodstruck 3D Fiber Lashes as received**
27 **if the lash component does not consist of "Natural Fibers" or "100% Natural**
28

1 **Green Tea Fibers.”**

2 **Plaintiff Brun also brings this case on behalf of the Ohio Class, and seeks**
3 **actual damages on its behalf. The measure of damages is the difference**
4 **between what the Ohio Class paid for the Yunique Moodstruck 3D Fiber**
5 **Lashes and the value of the Yunique Moodstruck 3D Fiber Lashes as received**
6 **if the lash component does not consist of “Natural Fibers” or “100% Natural**
7 **Green Tea Fibers.”**

8 **Plaintiff Reilly seeks actual damages for herself. The measure of**
9 **damages is the difference between what she paid for the Yunique Moodstruck**
10 **3D Fiber Lashes and the value of the Yunique Moodstruck 3D Fiber Lashes as**
11 **received if the lash component does not consist of “Natural Fibers” or “100%**
12 **Natural Green Tea Fibers.”**

13 **Plaintiff Reilly also brings this case on behalf of the Florida Class, and**
14 **seeks actual damages on its behalf. The measure of damages is the difference**
15 **between what the Florida Class paid for the Yunique Moodstruck 3D Fiber**
16 **Lashes and the value of the Yunique Moodstruck 3D Fiber Lashes as received**
17 **if the lash component does not consist of “Natural Fibers” or “100% Natural**
18 **Green Tea Fibers.”**

19 **It is for you to determine what damages, if any, have been proved.**

20 **Your award must be based upon evidence and not upon speculation,**
21 **guesswork or conjecture.**

22

23 **Original**

24 **It is the duty of the Court to instruct you about the measure of damages. By**
25 **instructing you on damages, the Court does not mean to suggest for which party**
26 **your verdict should be rendered.**

27 **If you find for the plaintiff [on the plaintiff’s [specify type of claim] claim],**
28

1 you must determine the plaintiff's damages. The plaintiff has the burden of proving
2 damages by a preponderance of the evidence. Damages means the amount of money
3 that will reasonably and fairly compensate the plaintiff for any injury you find was
4 caused by the defendant. You should consider the following:

5 [Insert types of damages. See Instruction 5.2 (Measures of Types of
6 Damages)]

7 It is for you to determine what damages, if any, have been proved.

8 Your award must be based upon evidence and not upon speculation,
9 guesswork or conjecture.

10 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
11 Circuit No. 5.1.

13 PROPOSED BY: _____
14 GIVEN AS PROPOSED _____
15 GIVEN AS MODIFIED _____
16 GIVEN ON COURT'S OWN _____
17 MOTION _____
18 REFUSED _____
19 WITHDRAWN _____
20

21 **INSTRUCTION NO. 43**

22 **Punitive Damages**

23 **43.a Plaintiffs' Proposed Modified Instruction.**

24 If you find for the plaintiffs, you may, but are not required to, award punitive
25 damages. The purposes of punitive damages are to punish a defendant and to deter
26 similar acts in the future. Punitive damages may not be awarded to compensate a
27 plaintiff.
28

1 The plaintiffs **have** the burden of proving by **clear and convincing evidence**
2 that punitive damages should be awarded and, if so, the amount of any such
3 damages.

4 You may award punitive damages only if you find that the defendant's
5 conduct that harmed the plaintiffs was malicious, oppressive or in reckless disregard
6 of the plaintiffs' rights. Conduct is malicious if it is accompanied by ill will, or
7 spite, or if it is for the purpose of injuring the plaintiffs. Conduct is in reckless
8 disregard of the plaintiffs' rights if, under the circumstances, it reflects complete
9 indifference to the plaintiffs' safety or rights, or if the defendant acts in the face of a
10 perceived risk that its actions will violate the plaintiffs' rights under federal law. An
11 act or omission is oppressive if the defendant injures or damages or otherwise
12 violates the rights of the plaintiffs with unnecessary harshness or severity, such as
13 by misusing or abusing authority or power or by taking advantage of some weakness
14 or disability or misfortune of the plaintiffs.

15 If you find that punitive damages are appropriate, you must use reason in
16 setting the amount. Punitive damages, if any, should be in an amount sufficient to
17 fulfill their purposes but should not reflect bias, prejudice or sympathy toward any
18 party. In considering the amount of any punitive damages, consider the degree of
19 reprehensibility of the defendant's conduct including whether the conduct that
20 harmed the plaintiffs was particularly reprehensible because it also caused actual
21 harm or posed a substantial risk of harm to people who are not parties to this case.
22 You may not, however, set the amount of any punitive damages in order to punish
23 the defendant for harm to anyone other than the plaintiffs in this case.

24
25 **43.b Defendant's Proposed Modified Instruction.**

26 If you find for the plaintiffs, you may, but are not required to, award punitive
27 damages. The purposes of punitive damages are to punish a defendant and to deter
28

1 similar acts in the future. Punitive damages may not be awarded to compensate a
2 plaintiff.

3 The plaintiffs **have** the burden of proving by **clear and convincing evidence**
4 that punitive damages should be awarded and, if so, the amount of any such
5 damages. **In order to recover punitive damages from a corporation, the**
6 **wrongful conduct must have been committed, authorized or ratified by an**
7 **officer, director, or managing agent of the corporation.**

8 You may award punitive damages only if you find that the defendant's
9 conduct that harmed the plaintiffs was malicious, oppressive or in reckless disregard
10 of the plaintiffs' rights. Conduct is malicious if it is accompanied by ill will, or
11 spite, or if it is for the purpose of injuring the plaintiffs. Conduct is in reckless
12 disregard of the plaintiffs' rights if, under the circumstances, it reflects complete
13 indifference to the plaintiffs' safety or rights, or if the defendant acts in the face of a
14 perceived risk that its actions will violate the plaintiffs' rights under federal law. An
15 act or omission is oppressive if the defendant injures or damages or otherwise
16 violates the rights of the plaintiffs with unnecessary harshness or severity, such as
17 by misusing or abusing authority or power or by taking advantage of some weakness
18 or disability or misfortune of the plaintiffs.

19 If you find that punitive damages are appropriate, you must use reason in
20 setting the amount. Punitive damages, if any, should be in an amount sufficient to
21 fulfill their purposes but should not reflect bias, prejudice or sympathy toward any
22 party. In considering the amount of any punitive damages, consider the degree of
23 reprehensibility of the defendant's conduct including whether the conduct that
24 harmed the plaintiffs was particularly reprehensible because it also caused actual
25 harm or posed a substantial risk of harm to people who are not parties to this case.
26 You may not, however, set the amount of any punitive damages in order to punish
27 the defendant for harm to anyone other than the plaintiffs in this case.

1 **Original:**

2 If you find for the plaintiff, you may, but are not required to, award punitive
3 damages. The purposes of punitive damages are to punish a defendant and to deter
4 similar acts in the future. Punitive damages may not be awarded to compensate a
5 plaintiff.

6 The plaintiff has the burden of proving by [a preponderance of the evidence]
7 [clear and convincing evidence] that punitive damages should be awarded and, if so,
8 the amount of any such damages.

9 You may award punitive damages only if you find that the defendant's
10 conduct that harmed the plaintiff was malicious, oppressive or in reckless disregard
11 of the plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite,
12 or if it is for the purpose of injuring the plaintiff. Conduct is in reckless disregard of
13 the plaintiff's rights if, under the circumstances, it reflects complete indifference to
14 the plaintiff's safety or rights, or if the defendant acts in the face of a perceived risk
15 that its actions will violate the plaintiff's rights under federal law. An act or
16 omission is oppressive if the defendant injures or damages or otherwise violates the
17 rights of the plaintiff with unnecessary harshness or severity, such as by misusing or
18 abusing authority or power or by taking advantage of some weakness or disability or
19 misfortune of the plaintiff.

20 If you find that punitive damages are appropriate, you must use reason in
21 setting the amount. Punitive damages, if any, should be in an amount sufficient to
22 fulfill their purposes but should not reflect bias, prejudice or sympathy toward any
23 party. In considering the amount of any punitive damages, consider the degree of
24 reprehensibility of the defendant's conduct [, including whether the conduct that
25 harmed the plaintiff was particularly reprehensible because it also caused actual
26 harm or posed a substantial risk of harm to people who are not parties to this case.
27 You may not, however, set the amount of any punitive damages in order to punish
28

1 the defendant for harm to anyone other than the plaintiff in this case].

2 [In addition, you may consider the relationship of any award of punitive
3 damages to any actual harm inflicted on the plaintiff.]

4 [Punitive damages may not be awarded against [specify defendant.] [You may
5 impose punitive damages against one or more of the defendants and not others, and
6 may award different amounts against different defendants.] [Punitive damages may
7 be awarded even if you award plaintiff only nominal, and not compensatory,
8 damages.]

9 **Source:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth
10 Circuit No. 5.5; Cal. Civ. Code § 3294; and *Hardt v. Chrysler Group LLC*, 2015
11 U.S. Dist. LEXIS 187386, *28-29 (C.D. Cal. June 15, 2015).

12
13 PROPOSED BY: .
14 GIVEN AS PROPOSED _____
15 GIVEN AS MODIFIED _____
16 GIVEN ON COURT'S OWN _____
17 MOTION
18 REFUSED _____
19 WITHDRAWN _____

20
21 **INSTRUCTION NO. [XX]**

22 **Burden of Proof—Clear and Convincing Evidence**

23 Plaintiffs believe that since the trial is bifurcated as to damages that this
24 instruction should appear in this order as opposed to its current position at
25 instruction number 5.

1 **INSTRUCTION NO. 44**

2 **Arguments of Counsel not Evidence of Damages**

3 The arguments of the attorneys are not evidence of damages. Your award
4 must be based on your reasoned judgment applied to the testimony of the witnesses
5 and the other evidence that has been admitted during trial.

6
7 **Source:** Judicial Council of California Civil Jury Instructions No. 3925, without
8 change.

9 **PROPOSED BY: BOTH PLAINTIFFS AND**
10 **DEFENDANT**

11 **GIVEN AS PROPOSED** _____

12 **GIVEN AS MODIFIED** _____

13 **GIVEN ON COURT'S OWN** _____

14 **MOTION**

15 **REFUSED** _____

16 **WITHDRAWN** _____

17
18 **INSTRUCTION NO. 45**

19 **Experts - Questions Containing Assumed Facts**

20 The law allows expert witnesses to be asked questions that are based on
21 assumed facts. These are sometimes called “hypothetical questions.”

22 In determining the weight to give to the expert’s opinion that is based on the
23 assumed facts, you should consider whether the assumed facts are true.

24
25 **Source:** Judicial Council of California Civil Jury Instructions No. 220, without
26 change.

PROPOSED BY: BOTH PLAINTIFFS AND

DEFENDANT

GIVEN AS PROPOSED _____

GIVEN AS MODIFIED _____

GIVEN ON COURT'S OWN _____

MOTION

REFUSED _____

WITHDRAWN _____

INSTRUCTION NO. 46

Consumers Legal Remedies Act- Essential Factual Elements (Civ. Code, § 1770)

46.a Plaintiffs' Proposed Modified Instruction.

Megan Schmitt claims that **Younique** engaged in unfair methods of competition and unfair or deceptive acts or practices in a transaction that resulted, ~~or was intended to result,~~ in the sale ~~or lease of goods or services~~ to a consumer, and that **she was** harmed by **Younique's** violation. To establish this claim, **Megan Schmitt** must prove all of the following:

1. That **Schmitt** acquired, ~~or sought to acquire, by purchase or lease,~~ **Younique Moodstruck 3D Fiber Lashes** for personal, family, or household purposes;

2. That **Younique** represented that **Younique Moodstruck 3D Fiber Lashes** contained "Natural Fibers" or "100% Natural Green Tea Fibers" when they **did not**, or that **Younique** advertised the **Younique Moodstruck 3D Fiber Lashes** as containing "Natural Fibers" or "100% Natural Green Tea Fibers" with the intent not to sell them as advertised;

1 3. That **Megan Schmitt and the members of the California Class** were
2 harmed; and

3 4. That the harm to **Megan Schmitt and the members of the California**
4 **Class** resulted from **Younique's** conduct.

5 The harm to **Megan Schmitt and the members of the California Class**
6 resulted from **Younique's** conduct if **Megan Schmitt** relied on **Younique's**
7 representation that **the lashes were made of "Natural Fibers" or "100% Natural**
8 **Green Tea Fibers."**

9
10 To prove reliance, **Megan Schmitt** need only prove that the representation
11 was a substantial factor in **her** decision. **She** does not need to prove that it was the
12 primary factor or the only factor in the decision.

13 If **Younique's** representation of fact was material, reliance may be inferred. A
14 fact is material if a reasonable consumer would consider it important in deciding
15 whether to buy or lease **the Younique Moodstruck 3D Fiber Lashes.**

16
17 **46.b Defendant's Proposed Modified Instruction.**
18 **For Plaintiff Schmitt**

19 **Plaintiff Schmitt** claims that **Younique** engaged in unfair methods of
20 competition and unfair or deceptive acts or practices in a transaction that resulted, ~~or~~
21 ~~was intended to result,~~ in the sale ~~or lease~~ of goods ~~or services~~ to a consumer, and
22 that **she was** harmed by **Younique's** violation. To establish this claim, **Plaintiff**
23 **Schmitt** must prove all of the following:

24 1. That **Schmitt** acquired, ~~or sought to acquire,~~ by purchase ~~or lease,~~
25 **Younique Moodstruck 3D Fiber Lashes** for personal, family, or household
26 purposes;

27 2. That **Younique** represented that **Younique Moodstruck 3D Fiber Lashes**
28

1 contained “Natural Fibers” or “100% Natural Green Tea Fibers” when they
2 did not, or that Younique advertised the Younique Moodstruck 3D Fiber
3 Lashes as containing “Natural Fibers” or “100% Natural Green Tea Fibers”
4 with the intent not to sell them as advertised;

5 3. That **Schmitt** was harmed; and

6 4. That the harm to **Schmitt** resulted from **Younique’s** conduct.

7 **Schmitt’s** harm resulted from **Younique’s** conduct if **Schmitt** relied on
8 **Younique’s** representation that the lashes were made of “Natural Fibers” or
9 “100% Natural Green Tea Fibers.” To prove reliance, **Schmitt** need only prove
10 that the representation was a substantial factor in **her** decision. **She** does not need to
11 prove that it was the primary factor or the only factor in the decision.

12 If **Younique’s** representation of fact was material, reliance may be inferred. A
13 fact is material if a reasonable consumer would consider it important in deciding
14 whether to buy or lease the **Younique Moodstruck 3D Fiber Lashes**.

15
16 **For the California Class**

17 **Plaintiff Schmitt** claims that **Younique** engaged in unfair methods of
18 competition and unfair or deceptive acts or practices in a transaction that resulted, ~~or~~
19 ~~was intended to result,~~ in the sale or lease of goods or services to a consumer, and
20 that the **California Class** was harmed by **Younique’s** violation. To establish this
21 claim, **Plaintiff Schmitt** must prove all of the following:

22 1. That the **California Class** acquired, ~~or sought to acquire,~~ by purchase or
23 lease, **Younique Moodstruck 3D Fiber Lashes** for personal, family, or household
24 purposes;

25 2. That **Younique** represented that **Younique Moodstruck 3D Fiber Lashes**
26 contained “Natural Fibers” or “100% Natural Green Tea Fibers” when they
27 did not, or that **Younique** advertised the **Younique Moodstruck 3D Fiber**
28

1 **Lashes as containing “Natural Fibers” or “100% Natural Green Tea Fibers”**
2 **with the intent not to sell them as advertised;**

3 3. That **the California Class** was harmed; and

4 4. That the harm to **the California Class** resulted from **Younique’s** conduct.

5 **The California Class’** harm resulted from **Younique’s** conduct if **the**
6 **California Class** relied on **Younique’s** representation that **the lashes were made of**
7 **“Natural Fibers” or “100% Natural Green Tea Fibers.”** To prove reliance,
8 **Schmitt on behalf of the California Class** need only prove that the representation
9 was a substantial factor in **the purchasing decisions of the California Class.** She
10 does not need to prove that it was the primary factor or the only factor in the
11 decision.

12 If **Younique’s** representation of fact was material, reliance may be inferred. A
13 fact is material if a reasonable consumer would consider it important in deciding
14 whether to buy or lease **the Younique Moodstruck 3D Fiber Lashes.**

15 **Original:**

16 [Name of plaintiff] claims that [name of defendant] engaged in unfair
17 methods of competition and unfair or deceptive acts or practices in a transaction that
18 resulted, or was intended to result, in the sale or lease of goods or services to a
19 consumer, and that [name of plaintiff] was harmed by [name of defendant]’s
20 violation. To establish this claim, [name of plaintiff] must prove all of the following:

21 1. That [name of plaintiff] acquired, or sought to acquire, by purchase or
22 lease, [specify product or service] for personal, family, or household purposes;

23 2. That [name of defendant] [specify one or more prohibited practices from
24 Civ. Code, § 1770(a), e.g., represented that [product or service] had characteristics,
25 uses, or benefits that it did not have];

26 3. That [name of plaintiff] was harmed; and

27 4. That [name of plaintiff]’s harm resulted from [name of defendant]’s
28

1 conduct.

2 [[Name of plaintiff]'s harm resulted from [name of defendant]'s conduct if
3 [name of plaintiff] relied on [name of defendant]'s representation. To prove
4 reliance, [name of plaintiff] need only prove that the representation was a substantial
5 factor in [his/her] decision. [He/She] does not need to prove that it was the primary
6 factor or the only factor in the decision.

7 If [name of defendant]'s representation of fact was material, reliance may be
8 inferred. A fact is material if a reasonable consumer would consider it important in
9 deciding whether to buy or lease the [goods/services].]

10 **Source:** Judicial Council of California Civil Jury Instructions No. 4700.

11

12 **PROPOSED BY:**

13 GIVEN AS PROPOSED _____

14 GIVEN AS MODIFIED _____

15 GIVEN ON COURT'S OWN _____

16 MOTION

17 REFUSED _____

18 WITHDRAWN _____

19

20 **INSTRUCTION NO. 47**

21 **Consumers Legal Remedies Act: Damages – For Plaintiff Schmitt**

22 Under California's Consumers Remedies Act, the measure of actual damages
23 is the difference between what Plaintiff Schmitt paid and the value of the Younique
24 Moodstruck 3D Fiber Lashes that she received.

25

26 **Source:** *Chowning v. Kohl's Dep't Stores, Inc.*, 735 Fed. Appx. 924, 924-25, n. 1
27 (2018) (citing *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal.App.4th 663 (2006)).

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PROPOSED BY: **DEFENDANT**
ONLY
GIVEN AS PROPOSED _____
GIVEN AS MODIFIED _____
GIVEN ON COURT'S OWN _____
MOTION
REFUSED _____
WITHDRAWN _____

INSTRUCTION NO. 48
Consumers Legal Remedies Act: Damages – For California Class
Under California’s Consumers Remedies Act, the measure of actual damages is the difference between what the California Class paid and the value of the Younique Moodstruck 3D Fiber Lashes that was received.
Source: *Chowning v. Kohl's Dep't Stores, Inc.*, 735 Fed. Appx. 924, 924-25, n. 1 (2018) (citing *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal.App.4th 663 (2006)).

PROPOSED BY: **DEFENDANT**
ONLY
GIVEN AS PROPOSED _____
GIVEN AS MODIFIED _____
GIVEN ON COURT'S OWN _____
MOTION
REFUSED _____
WITHDRAWN _____

1 **INSTRUCTION NO. 49**

2 **Ohio Implied Warranty**

3 **49.a Plaintiffs' Proposed Modified Instruction.**

4 MERCHANTABILITY WARRANTIES. When a merchant sells goods, a
5 warranty is implied that the goods will be merchantable. You will decide whether the
6 goods were merchantable. To be merchantable, the **Younique Moodstruck 3D Fiber**
7 **Lashes** must conform to the promises or affirmations of fact made on the container
8 or label, in this case, that **the fibers were "Natural Fibers" or "100% Natural**
9 **Green Tea Fibers."**

10
11 **49.b Defendant's Proposed Modified Instruction.**

12 **For Plaintiff Brun**

13 MERCHANTABILITY WARRANTIES. When a merchant sells goods, a warranty
14 is implied that the goods will be merchantable. You will decide whether the goods
15 were merchantable. To be merchantable, the **Younique Moodstruck 3D Fiber**
16 **Lashes** must conform to the promises or affirmations of fact made on the container
17 or label, in this case, that **the fibers were "Natural Fibers" or "100% Natural**
18 **Green Tea Fibers."**

19 **For the Ohio Class**

20 MERCHANTABILITY WARRANTIES. When a merchant sells goods, a
21 warranty is implied that the goods will be merchantable. You will decide whether the
22 goods were merchantable. To be merchantable, the **Younique Moodstruck 3D Fiber**
23 **Lashes** must conform to the promises or affirmations of fact made on the container
24 or label, in this case, that **the fibers were "Natural Fibers" or "100% Natural**
25 **Green Tea Fibers."**

26
27 **Original:**

MERCHANTABILITY WARRANTIES. When a merchant sells goods, a warranty is implied that the goods will be merchantable. You will decide whether the goods were merchantable. To be merchantable, the goods must conform to the promises or affirmations of fact made on the container or label, if any.

Source: Ohio Civil Jury Instructions, 1 505 OJI CV 505.13.

PROPOSED BY: _____
GIVEN AS PROPOSED _____
GIVEN AS MODIFIED _____
GIVEN ON COURT'S OWN _____
MOTION _____
REFUSED _____
WITHDRAWN _____

INSTRUCTION NO. 50

Ohio Express Warranty

50.a Plaintiffs' Proposed Modified Instruction.

1. INTRODUCTION. There are two types of warranties that may accompany a sale of goods: the first is the express warranty, arising from the agreed terms of the sale; the second is the implied warranty, arising only from the fact that a sale was made. Both may exist in the same sale. If the seller [**here, Yunique**] defaults under either type of warranty, the buyer [**here, Plaintiff Brun**] has remedies which will be discussed later.

2. FORMATION OF EXPRESS WARRANTY. If you find that (a) **Yunique made an affirmation of fact that the lashes were made of "Natural Fibers and/or "100% Natural Green Tea Fibers"** and (b) that **affirmation of fact** became a part

1 of the basis of the bargain between the parties, then the agreement contains an express
2 warranty that the goods will conform to the **affirmation of fact**.

3 3. PROMISE OR AFFIRMATION OF FACT. **Younique** has made an
4 **affirmation of fact that the lashes were made of “Natural Fibers and/or “100%**
5 **Natural Green Tea Fibers** if, from the facts and circumstances in evidence, you find
6 that a reasonable person in the position of the buyer would believe that the seller had
7 made an affirmation of fact about the goods.

8 4. BASIS OF THE BARGAIN. It is not necessary that the promise or
9 affirmation be the motivating factor of the sale or be relied upon by the buyer; it is
10 sufficient if the **affirmation of fact** is one of the bases of the bargain. If you find,
11 however, that the buyer did rely on the **affirmation of fact**, the **affirmation of fact**
12 would then be part of the basis of the bargain.

13
14 **50.b Defendant’s Proposed Modified Instruction.**

15 **For Plaintiff Brun**

16 INTRODUCTION. There are two types of warranties that may accompany a
17 sale of goods: the first is the express warranty, arising from the agreed terms of the
18 sale; the second is the implied warranty, arising only from the fact that a sale was
19 made. Both may exist in the same sale. If the seller [**here, Younique**] defaults under
20 either type of warranty, the buyer [**here, Plaintiff Brun**] has remedies which will be
21 discussed later.

22 FORMATION OF EXPRESS WARRANTY. If you find that (a) **Younique**
23 **made an affirmation of fact that the lashes were made of “Natural Fibers and/or**
24 **“100% Natural Green Tea Fibers”** and (b) that **affirmation of fact** became a part
25 of the basis of the bargain between the parties, then the agreement contains an express
26 warranty that the goods will conform to the **affirmation of fact**.

27 PROMISE OR AFFIRMATION OF FACT. **Younique** has made an
28

1 **affirmation of fact that the lashes were made of “Natural Fibers and/or “100%**
2 **Natural Green Tea Fibers** if, from the facts and circumstances in evidence, you find
3 that a reasonable person in the position of **Plaintiff Brun** would believe that
4 **Younique** had made an affirmation of fact about the goods.

5 BASIS OF THE BARGAIN. It is not necessary that the promise or affirmation
6 be the motivating factor of the sale or be relied upon by **Plaintiff Brun**; it is sufficient
7 if the **affirmation of fact** is one of the bases of the bargain. If you find, however, that
8 **Plaintiff Brun** did rely on the **affirmation of fact**, the **affirmation of fact** would then
9 be part of the basis of the bargain.

10
11 **For Ohio Class**

12 INTRODUCTION. There are two types of warranties that may accompany a
13 sale of goods: the first is the express warranty, arising from the agreed terms of the
14 sale; the second is the implied warranty, arising only from the fact that a sale was
15 made. Both may exist in the same sale. If the seller [**here, Younique**] defaults under
16 either type of warranty, the buyer [**here, the Ohio Class**] has remedies which will be
17 discussed later.

18 FORMATION OF EXPRESS WARRANTY. If you find that (a) **Younique**
19 **made an affirmation of fact that the lashes were made of “Natural Fibers and/or**
20 **“100% Natural Green Tea Fibers”** and (b) that **affirmation of fact** became a part
21 of the basis of the bargain between the parties, then the agreement contains an express
22 warranty that the goods will conform to the **affirmation of fact**.

23 PROMISE OR AFFIRMATION OF FACT. **Younique** has made an
24 **affirmation of fact that the lashes were made of “Natural Fibers and/or “100%**
25 **Natural Green Tea Fibers** if, from the facts and circumstances in evidence, you find
26 that a reasonable person in the position of the **Ohio Class** would believe that
27 **Younique** had made an affirmation of fact about the goods.

1 BASIS OF THE BARGAIN. It is not necessary that the promise or affirmation
2 be the motivating factor of the sale or be relied upon by the **Ohio Class**; it is sufficient
3 if the **affirmation of fact** is one of the bases of the bargain. If you find, however, that
4 the **Ohio Clas** did rely on the **affirmation of fact**, the **affirmation of fact** would then
5 be part of the basis of the bargain.

6
7 **Original:**

8 1. INTRODUCTION. There are two types of warranties that may accompany a sale
9 of goods: the first is the express warranty, arising from the agreed terms of the sale;
10 the second is the implied warranty, arising only from the fact that a sale was made.
11 Both may exist in the same sale. If the seller defaults under either type of warranty,
12 the buyer has remedies which will be discussed later.

13 2. FORMATION OF EXPRESS WARRANTY. If you find that (a) a (promise)
14 (affirmation of fact) was made by the (seller) (the seller's representative) and (b) the
15 (promise) (affirmation of fact) became a part of the basis of the bargain between the
16 parties, then the agreement contains an express warranty that the goods will conform
17 to the (promise) (affirmation of fact).

18 3. PROMISE OR AFFIRMATION OF FACT. The seller has made a (promise)
19 (affirmation of fact) if, from the facts and circumstances in evidence, you find that a
20 reasonable person in the position of the buyer would believe that the seller had made
21 (a promise) (affirmation of fact) about the goods.

22 4. BASIS OF THE BARGAIN. It is not necessary that the promise or affirmation
23 be the motivating factor of the sale or be relied upon by the buyer; it is sufficient if
24 the (promise) (affirmation of fact) is one of the bases of the bargain. If you find,
25 however, that the buyer did rely on the (promise) (affirmation of fact), the (promise)
26 (affirmation of fact) would then be part of the basis of the bargain.

1 Source: Ohio Civil Jury Instructions, 1 505 OJI CV 505.11.

2

3 PROPOSED BY: _____

4 GIVEN AS PROPOSED _____

5 GIVEN AS MODIFIED _____

6 GIVEN ON COURT'S OWN _____

7 MOTION

8 REFUSED _____

9 WITHDRAWN _____

10

11

INSTRUCTION NO. 51

12

Ohio Buyer's Damages for Breach Of Warranty of Accepted Goods

13

51.a Plaintiffs' Proposed Modified Instruction.

14

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16

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51.b Defendant's Proposed Modified Instruction.

22

For Plaintiff Brun

23

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26

27

28

GENERAL. If you find that the seller breached a warranty and the buyer accepted the goods, the buyer is entitled to the difference between the value of the goods at the time and place the buyer accepted them and the value they would have had if they had been as the seller warranted. To measure these damages you first must determine the value of the goods as warranted. Then subtract the value of the goods as accepted. The difference is the seller's damages.

GENERAL. If you find that **Younique** breached a warranty and **Plaintiff Brun** accepted the goods, **Plaintiff Brun** is entitled to the difference between the value of the goods at the time and place **she** accepted them and the value they would have had if they had been as **Younique** warranted. To measure these damages you first must determine the value of the goods as warranted. Then subtract the value of

1 the goods as accepted. The difference is **Plaintiff Brun’s** damages.

2
3 **For Ohio Class**

4 GENERAL. If you find that **Younique** breached a warranty and the **Ohio Class**
5 accepted the goods, the **Ohio Class** is entitled to the difference between the value of
6 the goods at the time and place **the Ohio Class** accepted them and the value they
7 would have had if they had been as **Younique** warranted. To measure these
8 damages you first must determine the value of the goods as warranted. Then subtract
9 the value of the goods as accepted. The difference is **the Ohio Class’** damages.

10
11 **Original:**

12 GENERAL. If you find that the seller breached a warranty and the buyer
13 accepted the goods, the buyer is entitled to the difference between the value of the
14 goods at the time and place the buyer accepted them and the value they would have
15 had if they had been as the seller warranted. To measure these damages you first
16 must determine the value of the goods as warranted. Then subtract the value of the
17 goods as accepted. The difference is the seller's damages.

18 Source: Ohio Civil Jury Instructions, 1 505 OJI CV 505.45.

19
20 PROPOSED BY: .
21 GIVEN AS PROPOSED _____
22 GIVEN AS MODIFIED _____
23 GIVEN ON COURT'S OWN _____
24 MOTION
25 REFUSED _____
26 WITHDRAWN _____

1 **INSTRUCTION NO. 52**

2 **Magnuson-Moss Warranty Claims**

3 **52.a Plaintiffs' Proposed Modified Instruction.**

4 The Magnusson-Moss Act is a federal warranty law that adopts the law of the
5 state in which the transaction occurred, in this case, Ohio. If you find that
6 **Younique** breached either its express or implied warranties to **Plaintiff Stephanie**
7 **Miller Brun** and the Ohio Class, then you must find that **Younique** also breached
8 the Magnusson-Moss Warranty Act.

9
10 **52.b Defendant's Proposed Modified Instruction.**

11 **For Plaintiff Brun**

12 The Magnusson-Moss Act is a federal warranty law that adopts the law of the state
13 in which the transaction occurred, in this case, Ohio. If you find that **Younique**
14 breached either its express or implied warranties to **Plaintiff Brun**, then you must
15 find that **Younique** also breached the Magnusson-Moss Warranty Act.

16 **For Ohio Class**

17 The Magnusson-Moss Act is a federal warranty law that adopts the law of the state
18 in which the transaction occurred, in this case, Ohio. If you find that **Younique**
19 breached either its express or implied warranties to **the Ohio Class**, then you must
20 find that **Younique** also breached the Magnusson-Moss Warranty Act.

21
22 Source: *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008);
23 Doc. 136 Order on Summary Judgment at page 14.

24
25 PROPOSED BY: .

26 GIVEN AS PROPOSED _____

27 GIVEN AS MODIFIED _____

1 GIVEN ON COURT'S OWN _____
2 MOTION
3 REFUSED _____
4 WITHDRAWN _____
5

6 **INSTRUCTION NO. 53**

7 **Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") Elements**

8 **53.a Plaintiffs' Proposed Modified Instruction.**

9 Plaintiff Deana Reilly, on behalf of the Florida Class, claims that Younique is
10 liable to her and the Florida Class for money damages for unfair and deceptive trade
11 practices. To recover damages, Plaintiff must show by the greater weight of the
12 evidence that:

13 (1) Defendant stated that the Younique Moodstruck 3D Fiber Lashes were
14 "Natural Fibers" and "100% Natural Green Tea Fibers" when the lashes were
15 neither;

16 (2) Defendant's conduct has violated the Florida Deceptive and Unfair
17 Trade Practices Act. The intent to deceive, or proof that anyone was actually
18 deceived, is not necessary. The Florida Deceptive and Unfair Trade Practices Act
19 is a statute designed to protect the consuming public and legitimate business
20 enterprises from those who engage in unfair or deceptive acts or practices in the
21 course of trade or commerce. Under that law it is enough that that Younique's
22 alleged misrepresentation had the capacity to deceive a reasonable consumer acting
23 reasonably under the circumstances³. A "reasonable person" does not refer to the

24 _____
25 ³ *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003) (a deception
26 occurs if there is a "representation, omission, or practice that is likely to mislead the consumer
27 acting reasonably in the circumstances, to the consumer's detriment") (quoting *Millenium*
28 *Comm'ns & Fulfillment, Inc. v. Office of the Attorney Gen.*, 761 So. 2d 1256, 1263 (Fla. 3d DCA
2000)); *Toback v. GNC Holdings, Inc.*, No. 13-80526-CIV, 2013 WL 5206103, at *3 (S.D. Fla.
Sept. 13, 2013) ("[T]he Eleventh Circuit has held that the element of causation is met when the
alleged misrepresentations would have deceived an objectively reasonable person.") (citing

1 Plaintiff or any particular member of the Class. It is a reasonable person in the same
2 position as Plaintiff and the Class⁴. An act need not violate a specific rule or
3 regulation to be considered deceptive⁵.

4 (3) Defendant's conduct offends established public policy, or was immoral,
5 unethical, oppressive, or unscrupulous, or was substantially injurious to Plaintiff.

6
7 **53.b Defendant's Proposed Modified Instruction.**

8 **For Plaintiff Reilly**

9 Plaintiff **Reilly** claims that **Younique** is liable to **her** for money damages for
10 unfair and deceptive trade practices. To recover damages, Plaintiff **Reilly** must
11 show by the greater weight of the evidence that:

12 (1) Defendant stated that the **Younique Moodstruck 3D Fiber Lashes**
13 **were "Natural Fibers" and "100% Natural Green Tea Fibers" when the lashes**
14 **were actually just ground up nylon;**

15 (2) Defendant's conduct has violated the **Florida Deceptive and Unfair**
16 **Trade Practices Act. The intent to deceive, or proof that anyone was actually**
17 **deceived, is not necessary. The Florida Deceptive and Unfair Trade Practices**
18 **Act is a statute designed to protect the consuming public and legitimate**
19 **business enterprises from those who engage in unfair or deceptive acts or**
20 **practices in the course of trade or commerce. Under that law it is enough that**

21
22

Fitzpatrick., 635 F.3d at 1283).

23 ⁴ *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 703 (Fla. 3d DCA 2000)
24 ("[M]embers of a class proceeding . . . need not individually prove reliance on the alleged
25 misrepresentations. It is sufficient if the class can establish that a reasonable person would have
26 relied on the representations."); *Jackson v. Inv. Corp. of Palm Beach*, 585 So. 2d 949, 950 (Fla.
4th DCA 1991) (citing 1 Williston on Contracts, § 94, 339-340, for an explanation of the
reasonable-person standard).

27 ⁵ "[A]n act does not need to violate a specific rule or regulation in order to be considered
28 deceptive." *Guerrero v. Target Corp.*, 889 F. Supp. 2d 1348, 1358 (S.D. Fla. 2012) (citing *Dep't of*
Legal Affairs v. Father & Son Moving & Storage, Inc., 643 So.2d 22, 24 (Fla. 4th DCA 1994)).

1 that Younique's alleged misrepresentation had the capacity to deceive a
2 reasonable consumer acting reasonably under the circumstances⁶. A
3 "reasonable person" does not refer to the Plaintiff. It is a reasonable person in
4 the same position as Plaintiff⁷. An act need not violate a specific rule or
5 regulation to be considered deceptive⁸.

6 (3) Defendant's conduct offends established public policy, or was immoral,
7 unethical, oppressive, or unscrupulous, or was substantially injurious to Plaintiff
8 Reilly.

9
10 **For Florida Class**

11 Plaintiff Deana Reilly, on behalf of the Florida Class, claims that Younique
12 is liable to the Florida Class for money damages for unfair and deceptive trade
13 practices. To recover damages, Plaintiff Reilly must show on behalf of the Florida
14 Class by the greater weight of the evidence that:

15 (1) Defendant stated that the Younique Moodstruck 3D Fiber Lashes
16 were "Natural Fibers" and "100% Natural Green Tea Fibers" when the lashes

17
18 ⁶ *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003) (a deception
19 occurs if there is a "representation, omission, or practice that is likely to mislead the consumer
20 acting reasonably in the circumstances, to the consumer's detriment") (quoting *Millenium
21 Comm'ns & Fulfillment, Inc. v. Office of the Attorney Gen.*, 761 So. 2d 1256, 1263 (Fla. 3d DCA
22 2000)); *Toback v. GNC Holdings, Inc.*, No. 13-80526-CIV, 2013 WL 5206103, at *3 (S.D. Fla.
Sept. 13, 2013) ("[T]he Eleventh Circuit has held that the element of causation is met when the
alleged misrepresentations would have deceived an objectively reasonable person.") (citing
Fitzpatrick., 635 F.3d at 1283).

23 ⁷ *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 703 (Fla. 3d DCA 2000)
24 ("[M]embers of a class proceeding . . . need not individually prove reliance on the alleged
25 misrepresentations. It is sufficient if the class can establish that a reasonable person would have
26 relied on the representations."); *Jackson v. Inv. Corp. of Palm Beach*, 585 So. 2d 949, 950 (Fla.
4th DCA 1991) (citing 1 Williston on Contracts, § 94, 339-340, for an explanation of the
reasonable-person standard).

27 ⁸ "[A]n act does not need to violate a specific rule or regulation in order to be considered
28 deceptive." *Guerrero v. Target Corp.*, 889 F. Supp. 2d 1348, 1358 (S.D. Fla. 2012) (citing *Dep't of
Legal Affairs v. Father & Son Moving & Storage, Inc.*, 643 So.2d 22, 24 (Fla. 4th DCA 1994)).

1 were actually just ground up nylon;

2 (2) Defendant's conduct has violated the **Florida Deceptive and Unfair**
3 **Trade Practices Act. The intent to deceive, or proof that anyone was actually**
4 **deceived, is not necessary. The Florida Deceptive and Unfair Trade Practices**
5 **Act is a statute designed to protect the consuming public and legitimate**
6 **business enterprises from those who engage in unfair or deceptive acts or**
7 **practices in the course of trade or commerce. Under that law it is enough that**
8 **that Younique's alleged misrepresentation had the capacity to deceive a**
9 **reasonable consumer acting reasonably under the circumstances**⁹. A
10 "reasonable person" does not refer to the any particular member of the **Florida**
11 **Class. It is a reasonable person in the same position as the Florida Class**¹⁰. An
12 **act need not violate a specific rule or regulation to be considered deceptive**¹¹.

13 (3) Defendant's conduct offends established public policy, or was immoral,
14 unethical, oppressive, or unscrupulous, or was substantially injurious to the **Florida**
15 **Class.**

16
17
18 ⁹ *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003) (a deception
19 occurs if there is a "representation, omission, or practice that is likely to mislead the consumer
20 acting reasonably in the circumstances, to the consumer's detriment") (quoting *Millenium*
21 *Comm'ns & Fulfillment, Inc. v. Office of the Attorney Gen.*, 761 So. 2d 1256, 1263 (Fla. 3d DCA
22 2000)); *Toback v. GNC Holdings, Inc.*, No. 13-80526-CIV, 2013 WL 5206103, at *3 (S.D. Fla.
Sept. 13, 2013) ("[T]he Eleventh Circuit has held that the element of causation is met when the
alleged misrepresentations would have deceived an objectively reasonable person.") (citing
Fitzpatrick., 635 F.3d at 1283).

23 ¹⁰ *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 703 (Fla. 3d DCA 2000)
24 ("[M]embers of a class proceeding . . . need not individually prove reliance on the alleged
25 misrepresentations. It is sufficient if the class can establish that a reasonable person would have
26 relied on the representations."); *Jackson v. Inv. Corp. of Palm Beach*, 585 So. 2d 949, 950 (Fla.
4th DCA 1991) (citing 1 Williston on Contracts, § 94, 339-340, for an explanation of the
reasonable-person standard).

27 ¹¹ "[A]n act does not need to violate a specific rule or regulation in order to be considered
28 deceptive." *Guerrero v. Target Corp.*, 889 F. Supp. 2d 1348, 1358 (S.D. Fla. 2012) (citing *Dep't of*
Legal Affairs v. Father & Son Moving & Storage, Inc., 643 So.2d 22, 24 (Fla. 4th DCA 1994)).

Source: 3 Florida Forms of Jury Instruction § 65.80; *Urling v. Helms Exterminators, Inc.*, 468 So. 2d 451, 453 (Fla. Dist. Ct. App. 1985); *Trans World Accounts, Inc. v FTC*, 594 F2d 212 (9th Cir. 1979)

PROPOSED BY: PLAINTIFFS .
GIVEN AS PROPOSED _____
GIVEN AS MODIFIED _____
GIVEN ON COURT'S OWN _____
MOTION
REFUSED _____
WITHDRAWN _____

INSTRUCTION NO. 54

Florida Deceptive and Unfair Trade Practices Act: Damages

54.a Plaintiffs' Proposed Modified Instruction.

Under the Florida Deceptive and Unfair Trade Practices Act the measure of actual damages is the difference in the market value of the **Younique Moodstruck 3D Fiber Lashes** in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the representations of **Younique**.

54.b Defendant's Proposed Modified Instruction.

For Plaintiff Reilly

Under the Florida Deceptive and Unfair Trade Practices Act the measure of actual damages is the difference in the market value of the **Younique Moodstruck 3D Fiber Lashes** in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the representations

1 of **Younique**.

2
3 **For Ohio Class**

4 Under the Florida Deceptive and Unfair Trade Practices Act the measure of
5 actual damages is the difference in the market value of the **Younique Moodstruck**
6 **3D Fiber Lashes** in the condition in which it was delivered and its market value in
7 the condition in which it should have been delivered according to the representations
8 of **Younique**.

9
10 **Source:** *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006).

11
12 PROPOSED BY: PLAINTIFFS .

13 GIVEN AS PROPOSED _____

14 GIVEN AS MODIFIED _____

15 GIVEN ON COURT'S OWN _____

16 MOTION

17 REFUSED _____

18 WITHDRAWN _____

19
20 **INSTRUCTION NO. 55**

21 **Affirmative Defense – Statute of Limitations**

22 **Modified:**

23 **Younique** contends that **Plaintiffs'** lawsuit was not filed within the time set
24 by law. To succeed on this defense, **Younique** must prove that:

25 **(a) Schmitt's claimed harm occurred before August 14, 2013;**

26 **(b) Reilly's claimed harm occurred before August 14, 2013; and/or**

27 **(c) Brun's claimed harm occurred before August 14, 2013.**

1
2 **Original:**

3 [Name of defendant] contends that [name of plaintiff]'s lawsuit was not filed
4 within the time set by law. To succeed on this defense, [name of defendant] must
5 prove that [name of plaintiff]'s claimed harm occurred before [insert date two or
6 four years before date of filing].

7 **Source:** Judicial Council of California Civil Jury Instructions No. 338
8

9 **PROPOSED BY: DEFENDANT**

10 **ONLY**

11 GIVEN AS PROPOSED _____

12 GIVEN AS MODIFIED _____

13 GIVEN ON COURT'S OWN _____

14 MOTION

15 REFUSED _____

16 WITHDRAWN _____

17
18 **INSTRUCTION NO. 56**

19 **Affirmative Defense – Standing**

20 In order to bring suit, each Plaintiff must have standing under the Federal
21 constitution, or what is known as Article III standing. Younique contends that each
22 Plaintiff lacks standing to bring her claims. To establish standing under Article III,
23 each Plaintiff must show:

24 (1) injury in fact, meaning that they have suffered an invasion of a legally
25 protected interest which is (a) concrete and particularized; and (b) actual or
26 imminent, not conjectural or hypothetical. By “particularized,” it is meant that the
27 injury must affect the plaintiffs in a personal and individual way.

28 (2) causation, meaning that there must be a causal connection between the

1 injury and the conduct complained of – the injury has to be fairly traceable to the
2 challenged action of Younique, and not the result of the independent action of some
3 third party not before the court; and

4 (3) redressability of injury, meaning that a remedy to the injury can be had.

5 **Source:** *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, n.1, 569 (1992)

6
7 **PROPOSED BY: DEFENDANT**

8 **ONLY**

9 GIVEN AS PROPOSED _____

10 GIVEN AS MODIFIED _____

11 GIVEN ON COURT'S OWN _____

12 MOTION

13 REFUSED _____

14 WITHDRAWN _____

15
16 **INSTRUCTION NO. 57**

17 **Affirmative Defense – Compliance**

18 If there is a finding that Younique harmed Plaintiffs, Younique contends its
19 actions were undertaken in good faith compliance with, and pursuant to, statutes,
20 government regulations and/or industry standards in existence at the time of the
21 activities.

22 “Good faith” means that Younique acted without actual fraudulent intent or
23 otherwise actively participate in any fraudulent scheme.

24 **Source:** Judicial Council of California Civil Jury Instructions No. 4207 (for good
25 faith); *Troyk v. Farmers Group, Inc.*, 171 Cal.App.4th 1305, 1332-3 (2009).

26 **PROPOSED BY: DEFENDANT**

27 **ONLY**

1 GIVEN AS PROPOSED _____
2 GIVEN AS MODIFIED _____
3 GIVEN ON COURT'S OWN _____
4 MOTION
5 REFUSED _____
6 WITHDRAWN _____

8 **INSTRUCTION NO. 58**

9 **Affirmative Defense – Laches**

10 Younique contends that Plaintiffs' unreasonably delayed in bringing this
11 lawsuit, and Younique was prejudiced as a result. To succeed on this defense,
12 Younique must prove by the preponderance of the evidence that:

- 13 (a) Schmitt unreasonably delayed in bringing suit; or
14 (b) Reilly unreasonably delayed in bringing suit; or
15 (c) Brun unreasonably delayed in bringing suit;
16 and as a result of such delay, Younique was prejudiced.

17 **Source:** *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir.
18 2002).

19
20 **PROPOSED BY: DEFENDANT**
21 **ONLY**

22 GIVEN AS PROPOSED _____
23 GIVEN AS MODIFIED _____
24 GIVEN ON COURT'S OWN _____
25 MOTION
26 REFUSED _____
27 WITHDRAWN _____

INSTRUCTION NO. 59

Affirmative Defense – Unjust Enrichment

Younique contends that Plaintiffs and Class Members would be unjustly enriched by an award of damages. To succeed on this defense, Younique must show that:

(1) Plaintiffs and Class Members received a benefit from using Younique’s Moodstruck 3D Fiber Lashes, because the product worked as promised to enhance the appearance of the eyelashes;

(2) Plaintiff Brun and presenter-Class Members received benefits from selling Younique’s Moodstruck 3D Fiber Lashes, such as commissions and discounts on other Younique purchases; and/or

(3) Plaintiff Brun and Class Members who hosted parties received benefits such as Y cash and half-priced coupons.

Additionally, Younique must show that it would be unjust for Plaintiffs and Class Members to retain these benefits and receive any damages.

Source: *Lectrodryer v. Seoulbank*, 77 Cal.App.4th 723, 726 (2000); *accord, Media Services Group, Inc. v. Bay Cities Comm., Inc.*, 237 F.3d 1326, 1330-31 (11th Cir. 2001).

PROPOSED BY: DEFENDANT ONLY

GIVEN AS PROPOSED	_____
GIVEN AS MODIFIED	_____
GIVEN ON COURT'S OWN MOTION	_____
REFUSED	_____
WITHDRAWN	_____

INSTRUCTION NO. 60

Affirmative Defense – Offset

Younique contends that if any award or relief is entered against Younique in favor of Plaintiffs and Class Members, then the recovery must be offset by the other value that Younique furnished to Plaintiffs and Class Members (the product worked as promised to enhance the appearance of the eyelashes; presenters' receipt of commissions and discounts for selling the Moodstruck 3D Fiber Lashes; party hosts' receipt of Y cash and/or half-priced coupons for hosting parties to sell the Moodstruck 3D Fiber Lashes).

Source: *Garg v. People ex rel. State Bd. of Equalization*, 53 Cal.App.4th 199, 211-12 (1997); citing *Jess v. Herrmann*, 26 Cal.3d 131, 142 (1979).

PROPOSED BY: DEFENDANT .

ONLY

GIVEN AS PROPOSED _____

GIVEN AS MODIFIED _____

GIVEN ON COURT'S OWN _____

MOTION

REFUSED _____

WITHDRAWN _____

Dated: January 29, 2019

NYE, STIRLING, HALE & MILLER, LLP

By: /s/

Jonathan D. Miller, Esq.
Alison M. Bernal, Esq.

Dated: January 29, 2019

CARLSON LYNCH SWEET
KILPELA & CARPENTER, LLP

By: /s/

Ed Kilpela, Esq.

1 Dated: January 29, 2019

THE SULTZER LAW GROUP P.C.

2 By: /s/
3 Adam Gonnelli, Esq.

4 Dated: January 29, 2019

WALSH, LLC

5 By: /s/
6 Bonner Walsh, Esq.

7 *Attorneys for Plaintiffs and the Class*

8
9 Dated: January 29, 2019

SHEPPARD, MULLIN, RICHTER &
HAMPTON, LLP

10 By: /s/ Sascha Henry
11 Sascha Henry, Esq.
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14 Local Rule 5-4.3.4 Certification: I hereby attest that all other signatories listed, on
15 whose behalf this filing is submitted, concur in the filing's content and have authorized
16 this filing.

/s/

17 Alison M. Bernal